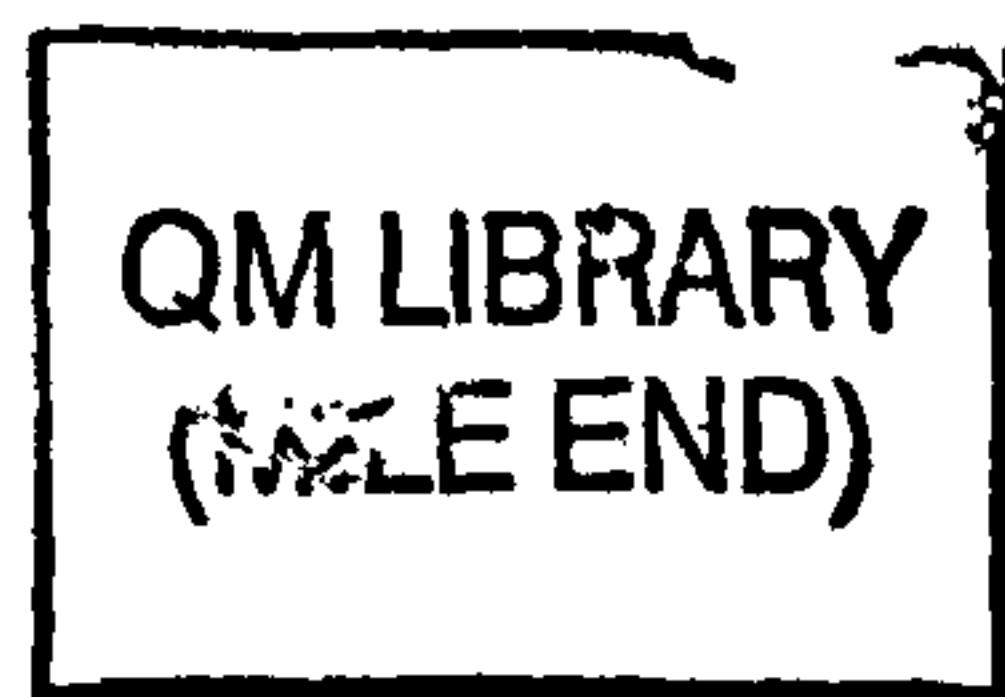


The Interpretation of Treaties by Foreign Investment Arbitral Tribunals

*A thesis submitted to the University of London
by Joseph Romesh Gregory Weeramantry
for the degree of Doctor of Philosophy**



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TO
MY PARENTS
WITH LOVE AND GRATITUDE

For thought is a bird of space, that in a cage of words may indeed unfold its wings but cannot fly.

Kahlil Gibran, *The Prophet* (London: Penguin Classics, 2002 reprint), at 68.

A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Justice Holmes, *Towne v Eisner*, 245 US 418 (1918), at 425.

ABSTRACT

This thesis explores the rules of treaty interpretation as they are applied by foreign investment arbitral tribunals (“FIATs”). Its primary aims are:

- a) to determine whether FIAT treaty interpretation practice is generally consistent with other international courts and tribunals;**
- b) to assess whether the treaty interpretation rules contained in the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”) are suitable for application in investor-State treaty disputes; and**
- c) to evaluate the contribution of FIAT treaty interpretation jurisprudence to international law.**

The body of the thesis provides a background to treaty interpretation rules in international law and then examines in detail the application of the rules of interpretation contained in the Vienna Convention by both international courts and tribunals and FIATs. It also explores modes of interpretation that have been deployed by these two groups which are not explicitly referenced in the Vienna Convention. Investigation is also made of some unique or notable aspects of FIAT jurisprudence that relates to treaty interpretation. The research was carried out primarily through the analysis of international court and tribunal decisions and FIAT awards.

The principal findings of the thesis are that:

- a) a general congruence exists between the interpretative practice of FIATs and that of other international courts and tribunals;**
- b) the application of the Vienna Convention rules on treaty interpretation are suitable for investment treaty arbitration, with some exceptions, e.g., in situations where investors have vastly disproportionate access to the preparatory work of treaties as compared with respondent States; and**
- c) FIATs have made a significant contribution to the international law of treaty interpretation.**

*** * ***

DECLARATION

I, Joseph Romesh Gregory Weeramantry, declare that the work presented in this thesis is my own. I have not, to the best of my knowledge, employed or referred to any arguments, comments, observations, statements or conclusions made by other persons without appropriate attribution.

Signature:

A handwritten signature in black ink, appearing to read 'R. Weeramantry', with a long, sweeping horizontal stroke extending to the right.

Date:

A handwritten date in black ink, '25 March 2011', written in a cursive style.

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PREFACE

Gustave Flaubert is said to have kept a scrap-book entitled ‘The Dictionary of Received Ideas’. Many parts of this thesis possess the same nature as Flaubert’s assemblage. Much of my work is a collection and systemisation of ideas received through the reading of arbitral awards and publications. They were not my ideas. I simply cut them out and pasted them into the numerous scrap-book like drafts of this thesis. The mechanics of my thesis writing process thus involved a good deal of plundering, reciting and recycling. As such, I feel a pinch of unease that it should be catalogued as a work solely attributed to me. But then again, I do take much pride in having tamed an unwieldy mass of received ideas and arranged them into a coherent, structured narrative, providing comments where I could make them and drawing on them to answer the primary questions posed in the thesis. Sometimes this involved long hours of tedious work in cold, lonely libraries. At other times, it seemed an indulgent pleasure. Part of the feelings I experienced during those highs are delightfully reflected in what the Pulitzer Prize winning author, Bernard Malamud, described as ‘the enjoyment of finding new opportunities in old sentences, twisting, tying, looping structure tighter, finding pegs to tie onto what were apparently not there before, deepening meanings, strengthening logicity’.¹

The primary well-spring of inspiration for this thesis is the exemplary role provided by my father. I will always be in awe at his inexhaustible passion for the rule of international law and his erudition in areas well beyond the law. Words are not capable of encapsulating my infinite gratitude to him. As a side note, I should mention that quite independent of him, I started upon my research and writing on treaty interpretation. Not until I was some way into the research did I pleasantly discover that my father had also given serious thought to writing on the subject. He subsequently discovered in his files a handwritten outline of the contents of a book on treaty interpretation. It is a loss to all of us that he did not continue this endeavour, as he would have—in his inimitable style—produced a majestic work brimming with vision and inspiration.

Two subsidiary sources of inspiration also need to be acknowledged. First is the seed planted in my mind by Toby Landau’s address at the London ICCA conference. He there spoke about public international law as a forgotten resource for commercial lawyers and suggested employing Article 31(3)(a) of the Vienna Convention on the Law of Treaties to clarify the New York Convention.² The second, took place later, as I was starting to realise the immense dimensions of the material required to be

¹ Quoted in Joyce Carol Oates, ‘Today I Invented Sunshine’, *Times Literary Supplement*, 21 & 28 December 2007, at p. 11.

² See Toby Landau, ‘The Requirement of a Written Form for an Arbitration Agreement: when “Written” Means “Oral”’, in A.J. van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No. 11, ICCA Conference, London (The Hague: Kluwer 2002), p. 19, at pp. 75-80. Originally my thesis topic focussed on the use of the Vienna Convention on the Law of Treaties to interpret the New York Convention.

marshalled to formulate the thesis. At that time, I had the good fortune of reading Aristotle's *The Politics*. His assiduous use of sources to compile his study of constitutions more than 2000 years ago struck me as nothing short of monumental. If this could be done with the rudimentary materials and research tools available to Aristotle, I – as a beneficiary of the technological advances bestowed by the likes of Gutenberg, Gates and Google – had no excuse for submitting a thesis that lacked a high degree of research.

Nonetheless, despite the tremendous advantages of modern technology, the deluge of arbitration awards that have flooded the plains of international investment law since I commenced my research has prevented me from reviewing every award. I did, however, attempt to cover the most prominent decisions, particularly those reported in the ICSID Reports. Out of practical necessity, March 2009 was arbitrarily imposed as a cut-off point. Prominent awards published after this date have not been considered as thoroughly as awards issued prior to this date. If relevant case law is omitted, I alone am answerable for this deficiency.

As a result of my common law training, I am also answerable for any distortions created by a disproportionate use of common law references or analogies. It is hoped that the inevitable shortcomings produced by this narrowness of perspective may be rectified by scholars who have familiarity with the world's other legal systems and traditions.

All the investment arbitration awards and decisions cited in this thesis, unless otherwise indicated, are available at <http://ita.law.uvic.ca> or www.investmentclaims.com. To be economical with words and to avoid repetition, I have refrained from mentioning these websites when citing awards. In relation to ICSID awards, <http://icsid.worldbank.org> helpfully cites other reports or journals where these awards have been published. Where the cited awards have paragraph numbers, usually those only have been cited in footnotes. Where no paragraph numbers are present, a citation has been made to the page number in the ICSID Reports, or other relevant report. In the footnotes, quotations are provided in parentheses where they are short and to the point. They are not so provided when relevant sections are too lengthy to quote or are otherwise not suitable for quotation.

Writing this thesis has, at times, felt like partaking in a voyage scripted by Homer, full of delays, distractions and danger. The energy and the desire needed to sustain me on this epic journey would not have been sufficient without the extraordinary and unconditional support from all my family (including nieces, nephews, aunts and uncles) and the finest of friends. There also several academics and practitioners who have generously shared their time and views with me. To the best of my abilities, I set out here a list of those who have assisted in this odyssey of mine. There is a risk that I have made some omissions and of course this has not been intentional. Profound thanks must be given to my mother and father for their love, concern, kindness and financial support; Professors Julian Lew QC and Loukas Mistelis for their expert guidance on the thesis content and their unfaltering encouragement despite the many completion schedules that slipped their leash; Ravi, Shala, Nil, Rosh, their beautiful families, Uncle Trevor, Aunt Yvonne, Danthi and all at Littleton Street for their

constant interest, care and support; Manu for her wonderful relief packages sent to me in all corners of the world; Andy and Rach for keeping up my spirits by taking me on their incredible adventures; Shane and Ios for the homely London accommodation; Jules for the friendship and the coffee; Mizuno for their running shoes (runs often maintained my sanity); and Claire Wilson for her swift and thorough editing. Special appreciation must also be recorded for the help and wise advice received at various stages from (in alphabetical order) Professor Georges Abi-Saab, Dr Femi Elias, Professor Judd Epstein, Professor Malgosia Fitzmaurice, Professor Tom Franck, Professor Alejandro Garro, Craig Harrison SC, Dr Veijo Heiskanen, Dr Sarah Hilmer, Professor Michael Reisman, Silja Schaffstein, Tim Sowden and Professor Wang Guiguo.

I must also thank the staff and acknowledge the first-class facilities of the following libraries at which I had the privilege to study and conduct research for the thesis: City University of Hong Kong; Columbia Law School, New York; L'Institut de hautes études internationales et du développement (HEI), Geneva; Institute of Advanced Legal Studies, University of London; London School of Economics; Monash University Faculty of Law, Melbourne; New York University School of Law; the Peace Palace Library, The Hague; and the United Nations Library, Palais des Nations, Geneva.

Finally, for the motivation to wrap up my work with still so many sources and avenues unexplored and to desist from including everything possibly relevant in the thesis, I am indebted to the observation of Barry Humphries in his autobiography *My Life as Me*: 'Voltaire was right when he defined a bore as a man who leaves nothing out'.

* * *

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| Spain-USSR BIT | Agreement between the Union of Soviet Socialist Republics and Spain concerning the Promotion and Reciprocal Protection of Investments, IC-BT 211 (1990) |
| Switzerland-Pakistan BIT | Agreement between the Swiss Confederation and the Islamic Republic of Pakistan concerning the Promotion and Reciprocal Protection of Investments, IC-BT 730 (1995) |
| Switzerland-Philippines BIT | Agreement between the Swiss Confederation and the Republic of the Philippines concerning the Promotion and Reciprocal Protection of Investments, IC-BT 731 (1997) |
| Ukraine-Lithuania BIT | Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments (1994) |
| US-Albania BIT | Treaty between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, IC-BT 383 (1995) |
| US-Australia FTA | Australia-United States Free Trade Agreement (2005) |
| US-Ecuador BIT | Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, IC-BT 398 (1993) |
| US-Egypt BIT | Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, IC-BT 399 (1982) |
| US-Iran Treaty of Amity | Treaty of Amity, Economic Relations and Consular Rights of 1955 between United States of America and Iran; signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 |
| US-Zaire BIT | Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, IC-BT 394 (1984) |

* * *

ABBREVIATIONS

In this thesis, the following abbreviations, unless otherwise indicated, have the meanings assigned to them below:

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| <i>AJIL</i> | American Journal of International Law |
| <i>AIDI</i> | Annuaire de l’Institut de Droit International |
| <i>Annual Digest</i> | Annual Digest and Reports of Public International Cases |
| Article 31 | Article 31 of the Vienna Convention |
| Article 32 | Article 32 of the Vienna Convention |
| ASEAN | Association of South East Asian Nations |
| ASIL Proceedings | Proceedings of the American Society of International Law |
| BIT | Bilateral Investment Treaty |
| <i>BYBIL</i> | British Year Book of International Law |
| CISG | United Nations Convention on Contracts for the International Sale of Goods (1980) |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| ECT | Energy Charter Treaty |
| EECC | Eritrea Ethiopia Claims Commission |
| EHRC | European Convention on Human Rights |
| EU | European Union |
| Executive Directors’ Report | Report of the Executive Directors on the ICSID Convention |
| Fauchald empirical analysis | The study conducted by Ole Kristian Fauchald and reported in ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’, 19(2) <i>European Journal of International Law</i> 301 (2008) |
| FCN treaties | Friendship, commerce and navigation treaties |
| FIAT | Foreign Investment Arbitral Tribunal. For the purposes of the thesis, this designation is wide-ranging and covers any arbitral tribunal established specifically to resolve a claim of an investor against a State. These include any ICSID or NAFTA tribunal or ICSID <i>ad hoc</i> Committee. It does not, however, cover the International Court of Justice, the Iran-United States Claims Tribunal, the UN Compensation Commission or Holocaust-related claims |

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| | resolution tribunals. |
| FTC | NAFTA Free Trade Commission |
| FTC Interpretation | ‘Notes of Interpretation of Certain Chapter XI Provisions’ issued by the FTC on 31 July 2001 |
| GA | United Nations General Assembly |
| Harvard Draft Convention | Harvard Research in International Law, Draft Convention on the Law of Treaties 1935 |
| IACHR | Inter-American Court of Human Rights |
| ICJ | International Court of Justice |
| <i>ICLQ</i> | International and Comparative Law Quarterly |
| ICSID | International Centre for the Settlement of Investment Disputes |
| ICSID (Additional Facility) Rules | Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID |
| ICSID Convention (alternatively Washington Convention) | 1965 Convention for the Settlement of Investment Disputes between States and Nationals of Other States. |
| ICSID Rules | Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID, adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention |
| IIA | International Investment Agreements |
| ILC | International Law Commission |
| ILC Commentary | 1966 commentary of the ILC on its draft articles on the Law of Treaties, in Report of the ILC to the General Assembly on the work of its eighteenth session, UN Doc. A/6309/Rev.1, YILC (1966-II), at 217-226. |
| <i>ILM</i> | International Legal Materials |
| ILR | International Law Reports |
| Institute | Institute of International Law |
| Iran-US CTR | IUSCT Reports |
| ISDS | Investor-state dispute settlement |
| ITLOS | International Tribunal on the Law of the Sea |
| IUSCT | Iran-United States Claims Tribunal |
| jurisprudence | Unless otherwise indicated, this term refers to both case law and scholarly literature/opinion |
| MFN clause | Most favoured nations clause |
| NAFTA | North American Free Trade Agreement |

| | |
|---|---|
| OPIC | Overseas Private Investment Corporation |
| PCIJ | Permanent Court of International Justice |
| RGDIP | Revue générale de droit international public |
| RIAA | United Nations Reports of International Arbitral Awards |
| SC | United Nations Security Council |
| UN | United Nations |
| UN Charter | Charter of the United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| <i>UNTS</i> | United Nations Treaty Series |
| US | United States of America |
| VCOR | Official Records of the Vienna Conference |
| Vienna Conference 1968 | UN Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968. |
| Vienna Conference 1969 | UN Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969. |
| Vienna Conference | 1968 Vienna Conference and 1968 Vienna Conference |
| Vienna Convention | 1969 Vienna Convention on the Law of Treaties |
| Vienna Convention Rules | Articles 31 and 32 of the Vienna Convention |
| Waldock III | Sir Humphrey Waldock’s Third Report as ILC Special Rapporteur on the law of treaties, YILC (1964-II), UN Doc. A/CN.4/167 and Add. 1-3 (1964) |
| Washington Convention (alternatively ICSID Convention) | Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 |
| <i>YILC</i> | Yearbook of the International Law Commission |

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Chapter I

OVERVIEW

A. INTRODUCTION

1. Objectives

1. This thesis concerns the application of treaty interpretation rules by foreign investment arbitral tribunals ('FIATs'). It endeavours
 - a) to determine whether FIAT treaty interpretation practice is generally consistent with other international courts and tribunals;
 - b) to assess whether the treaty interpretation rules contained in the 1969 Vienna Convention on the Law of Treaties³ ('Vienna Convention') are suitable for application in investor-State treaty disputes; and
 - c) to evaluate the contribution of FIAT treaty interpretation jurisprudence to international law.

³ Vienna Convention on the Law of Treaties (1969), UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 *ILM* 679; and 63 *AJIL* 875 (1969), adopted on 22 May 1969 and entered into force on 27 January 1980.

2. The work is divided into seven Chapters. This first Chapter introduces the thesis and states, *inter alia*, its objectives, nature and scope. It also provides a brief description of treaty law and investment treaties. Chapter II describes the historical background and current status of the international law rules pertaining to treaty interpretation. Chapters III and IV contain a detailed analysis of the treaty interpretation rules expressed in Articles 31 and 32 of the Vienna Convention ('Vienna Convention Rules'). Chapter V explores other supplementary means of interpretation not explicitly specified in the Vienna Convention. Chapter VI discusses some salient features of FIAT practice relating to the interpretation of treaties. Chapter VII completes the thesis by addressing the three core issues set out in the introductory paragraph above.

2. *Nature of Subject Matter*

3. Most international adjudications involving States feature disputes as to the meaning of treaty provisions.⁴ This phenomenon is in large measure attributable to the imperfections of language and the ineffable complexity of human interaction. Practical necessity has thus dictated that principles or rules⁵ of treaty interpretation

⁴ See, e.g., Jennings and Watts (eds.), *Oppenheim's International Law* (1992), at 26 (commenting that the jurisdiction of the ICJ 'has been most frequently invoked for the purpose of interpreting treaties'); and Aust, *Modern Treaty Law and Practice* (2000), at 184 ('there is no treaty which cannot raise some question of interpretation'). See also the ILC Commentary, *YILC* (1966-II), at 218, para. 3 and Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties', 150 *Recueil des cours* 195 (1976-II).

⁵ Unless otherwise specified in this thesis, the terms 'rules' and 'principles' of treaty interpretation will be used synonymously. The Convention on the Settlement of Investment Disputes between States and National of Other States appears to juggle these two terms. In the English version of that Convention, Article 42(1) contains three references to 'rules' of international law whereas the French version of that same provision speaks twice of 'règles' and—with no apparent reason—once of 'principes'. For further commentary on this inconsistency in terminology, see Schreuer, *The ICSID Convention: A Commentary* (2001), at 608-9. In Schreuer's view, principles would indicate 'a higher level of generality and abstraction.' *Ibid.*, at 608. The ICSID Convention may be contrasted with Article 26(6) of the Energy Charter Treaty, which provides that '[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable *rules and principles* of international law' (emphasis added). See also *Klöckner (Annulment)*, at para. 68.

Some useful theoretical distinctions have been made between the two terms by Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 367 (taking the view that principles 'form the theoretical bases of positive rules of law. The latter are the practical formulation of the principles and, for reasons of expediency, may vary and depart, to a greater or lesser extent, from the principle from which they spring'); Bennion, *Statutory Interpretation: A Code* (2002), at 467 and

assume an important role in the resolution of differences between States and, increasingly, between States and private investors. Notwithstanding their practical importance, treaty interpretation rules have not developed—and are unlikely ever to develop—into straightforward formulae that mechanically extract incisive meanings from treaty texts swollen with ambiguity. As the International Law Commission observed in its commentary to the provisions that were eventually to become Articles 31 and 32 of the Vienna Convention, interpretation is ‘an art, not an exact science.’⁶

4. Treaty interpretation rules are often applied without uniformity, if applied at all. They find expression in concise language, yet are deceptively complex. They have helped resolve disputes, but have also created them. They have been credited with upholding the intentions of the parties, but equally have been criticised for ignoring them. While they have helped to clarify treaty provisions, the rules themselves have been accused of lacking clarity.

5. Not surprisingly, scholarly literature often recalls with approval the observation of Lord McNair that ‘[t]here is no part of the law of treaties which the

657 (commenting (in relation to English statutory interpretation) that ‘[a] rule of construction must be followed ... A criterion is not deserving of the name *rule* unless it is compelling’ and that a ‘principle of statutory interpretation can ... be described as a principle of legal policy formulated as a guide to legislative intention’); and Klob, ‘General Principles of Law’, in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 677 (2006), at 794-5. But see Mendelson, ‘The International Court of Justice and Sources of International Law’, in Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), at 63, 80 (‘although there is quite a debate among legal theorists as to the difference and hierarchical relation between rules and principles, none of this finds any reflection in the utterances of the ICJ, which tends to treat the two terms as synonymous’).

⁶ International Law Commission, Commentary to Draft Articles 27 & 28, para. 4, *YILC* (1966-II), at 218, reprinted in *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference* (1971), at 38. Similarly, see Amerasinghe, ‘The Jurisdiction of the International Centre for the Settlement of Investment Disputes’, 19 *Indian J. Int’l Law* 166 (1979), at 167 (treaty interpretation is ‘a delicate art rather than a strict science’); Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 153 (‘Interpretation is a process involving the deployment of analytical and other skills: it cannot be reduced to a few propositions capable of purely automatic application in all circumstances.’); and Harvard Law School, Research on International Law, Part III Draft Convention on the Law of Treaties, with Comment, 29 *AJIL (Supplement)* 657 (1935), at 939 (the process of interpretation ‘calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolutely and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.’). See also *Oppenheim*, *supra* note 4, at 1271; and *Generation Ukraine*, at para. 20.29.

text-writer approaches with more trepidation than the question of interpretation'.⁷ It is against this background that we embark upon the present examination of treaty interpretation.

3. *Pre-research Hypotheses*

6. Prior to the commencement of the research, two FIAT practices were contemplated as possible findings: (i) FIATs pay a high degree of lip service to public international law rules of treaty interpretation or misapply them;⁸ and (ii) in comparison with other international courts and tribunals, FIATs are more open to drawing guidance from domestic law approaches to interpretation, such as the 'mischief rule' in statutory interpretation or the contractual interpretation principles famously enunciated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.⁹ The reason for this outcome prediction was due in large measure to (i) the commercial nature of foreign investment and (ii) the commercial backgrounds of many FIAT arbitrators.¹⁰ As a consequence of the above

⁷ McNair, *The Law of Treaties* (1961), at 364. More recently, one scholar has maintained that '[t]he issue of treaty interpretation remains a deeply obscure and subjective process'. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', 55 *ICLQ* 281 (2006), at 281. The ILC commented that '[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties.' *YILC* (1966-II), at 218-19, para. 5. In relation to the interpretation of domestic statutes, Justice Frankfurter of the United States Supreme Court once noted with illuminating candour that canons of construction cannot 'save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements.' Justice Felix Frankfurter, 'Some Reflections on the Reading of Statutes', 2 *The Record of the Association of the Bar of the City of New York* 213 (1947), at 235. See also Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), at 19 ('The interpretation of treaties is, perhaps, one of the most confused subjects in international law to-day').

⁸ See, e.g., *United States v Canada*, LCIA Case No. 81010, Expert Opinion by Professor W. Michael Riesman, 'Opinion with respect to Selected International Legal Problems in LCIA Case No. 7941', 1 May 2009, at para. 7 (commenting that the Vienna Convention Rules 'have become something of a *clause de style* in international arbitral awards, where they are often briefly referred to or ... solemnly reproduced verbatim, and then largely ignored.').

⁹ [1997] UKHL 28; [1998] 1 All ER 98.

¹⁰ A few commentators have expressly questioned whether the appointment of arbitrators in investment treaty arbitrations is suitable if they lack public international law expertise. See, e.g., Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in Sauvart (ed.), *Appeals*

two possibilities, it was considered possible that the thesis could reveal a specific regime of interpretation or *lex specialis* (for example, a hybrid of international and domestic law) that evolved from the interpretation of investment treaties by FIATs. It will be seen from the ensuing pages that the research has found this not to be the case.

4. Method of Research

7. The research required for the thesis was carried out in two discrete phases: (i) research on public international law generally and (ii) research specifically on FIAT awards and practice. The first phase surveyed treaty interpretation as generally accepted in international law, relying mainly on international law cases, particularly those of the ICJ, PCIJ and other prominent arbitral awards (excluding FIATs), the ILC commentaries on its draft articles on the law of treaties and related ILC reports by special rapporteurs. Relevant academic literature was also examined. The materials collected during this phase have been distilled in the sub-sections headed ‘International Law Practice’. Space permitted only a fraction of the collected materials to be included. As such, these sub-sections do not purport to provide a comprehensive survey of the law on the subject but contain sufficient material to enable a fruitful comparison to be made with FIAT practice in the area.

8. In contrast, the material gathered in the second phase—on FIAT practice in relation to treaty interpretation—finds far greater exploration and analysis in the thesis. This material is presented in the sub-sections entitled ‘FIAT Practice’. The

Mechanism in International Investment Disputes 39 (2008), at 42 (“The pronouncements of commercial arbitrators on substantial issues of international law involved in treaty-based investment arbitration can be open to question. Tribunals can consist of judges or arbitrators inexperienced in matters of international law or without a long period of experience in the field, which makes it difficult to speak authoritatively as representative tribunals of the international community.”); and Mendelson, ‘The Runaway Train: the “Continuous Nationality Rule” From the *Panevezys-saldutiskis Railway* case to *Loewen*’, in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 97 (2005), at 136 (commenting that none of the members of the *Loewen v United States* tribunal was ‘a specialist public international lawyer, although they will have encountered international law issues from time to time in their work. This is perhaps unfortunate, given that the key issues turned out to concern that discipline’). Article 35(2) of the ASEAN Comprehensive Investment Agreement 2009 takes this concern into account, providing that ‘[a]ny person appointed as an arbitrator shall have expertise or experience in public international law’. See also Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), at 19 (‘Jurists and judges, trained in various systems of private law, are not infrequently prejudiced by rules of their own judicial systems’).

primary source for research in this second phase was the burgeoning mass of publicly available FIAT awards. Materials extrinsic to these awards, such as academic commentary and the texts of the hundreds of bilateral investment treaties, while important, played a subordinate role in the research and were not consulted in an exhaustive or systematic basis. In reviewing the awards, no attempt was made to conduct an empirical or quantitative analysis so as to establish the precise number of cases that have applied one interpretative principle or another. This examination has been undertaken elsewhere.¹¹ The research adopted a qualitative approach, which assessed the treaty interpretation methods applied and did not focus on the frequency of application of those methods.

9. One of the problems encountered in examining the awards was that several did not refer to or otherwise indicate that they have applied the Vienna Convention Rules.¹² In these instances, the tribunals appeared to be using notions of common sense or logic rather than any structured or established rule.¹³ At other times, FIATs did not delve into those Rules in any great detail. But this also is not an uncommon occurrence in the practice of other international law courts and tribunals.¹⁴

5. *Scope of Thesis*

10. The focus of the thesis is the examination of treaty interpretation techniques. By and large, it does not intend to assess the correctness of the substantive determinations produced by the interpretations subject to scrutiny in this thesis. Any evaluation of substantive issues will be incidental to the primary objectives of the thesis.

¹¹ See Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', 19(2) *European Journal of International Law* 301 (2008), at 313-314.

¹² See also Fauchald, *ibid.*, at 308.

¹³ On this issue, see also Chapter VI, Section B.

¹⁴ See, e.g., Gardiner, *International Law* (2003), at 79 (noting that "international courts and tribunals do not indicate at every step when interpreting a treaty which principle of the Vienna Convention they are applying. General references may make explicit that the court or tribunal intends to apply the rules, but particular references are more likely to be made only when some uncertainty arises whether a particular element of interpretation is admissible.").

11. For the purpose of this thesis, the term FIAT refers to arbitral tribunals constituted to determine disputes under investor-State agreements, BITs, the ECT, other investment treaties or FTAs, particularly NAFTA. It does not include the Iran-US Claims Tribunal or a Chamber thereof, and it covers only awards rendered after the 1990 *AAP* award.¹⁵

12. Topics that lie outside the scope of the present work include (1) the interpretation of treaties by domestic courts,¹⁶ (2) the interpretation of international commercial agreements,¹⁷ investor-State agreements, awards, commercial documents, or domestic legislation, (3) OPIC decisions, (4) the use of different language versions to interpret treaties, including application of Article 33 of the Vienna Convention (concerning the interpretation of plurilingual treaties), and (5) the rules of treaty interpretation applicable in disputes between states and international organisations. The major part of the findings is based on FIAT awards issued before March 2009. However, where awards of high relevance have been issued subsequent to that date, an attempt has been made to incorporate them in the text to the extent that this was possible.

¹⁵ The temporal significance of this award is that it was the first award issued under the auspices of ICSID.

¹⁶ With specific regard to domestic court interpretations of investment treaties, see, e.g., *Guinea v Maritime International Nominees Establishment*, Court of First Instance, Antwerp, 27 September 1985, 4 ICSID Reports 32; *Guinea v Maritime International Nominees Establishment*, Swiss Federal Tribunal, 4 December 1985, at 4 ICSID Reports 35; *Czech Republic v CME Czech Republic BV*, Svea Court of Appeal (Sweden), at pp. 6-7; *Mexico v Metalclad*, Supreme Court of British Columbia, 2 May 2001, Tysoe J., at paras. 63, 70-72; *Ecuador v Occidental Exploration & Production Co* (No. 2), English High Court, [2006] EWHC 345 (Comm), para. 90; and *Czech Republic v European Media Ventures SA*, English High Court, [2007] EWHC 2851 (Comm), para. 14 *et seq.*

¹⁷ For FIAT practice in this regard, see *Mobil Oil*, 4 ICSID Reports, at 187-9, paras. 6.6-6.9; and *Tanzania Electric (Award)*, Appendix B, para. 40; and *Amco (Jurisdiction)*, at para. 14(i).

B. TREATY LAW

1. *Vienna Convention of 1969 on the Law of Treaties*

13. Prior to the formulation of the Vienna Convention, a number of codifications of treaty law had been attempted. None of them attained any degree of universal acceptance.¹⁸ Given this background, an early priority of the ILC was to codify the law of treaties.¹⁹ Between 1950 and 1966, sixteen reports were prepared by ILC special rapporteurs on the topic.²⁰ From these reports emerged a set of final draft articles, which were submitted to the General Assembly of the United Nations in 1966 with a recommendation that it should convene a conference to study those articles and to conclude a convention on the subject.²¹ In response, the General Assembly convened a conference on the law of treaties in Vienna ('Vienna Conference') to consider those draft articles.²² The Vienna Conference was held in two sessions in

¹⁸ See, e.g., the Appendices to the First Report on the law of treaties by ILC Special Rapporteur Brierly, *YILC* 222 (1950-II), at 243-248, which reproduce relevant sections of the Convention on Treaties adopted in Havana (1928) and other treaty law codifications by the International Commission of American Jurists (Rio de Janeiro, 1927), Field (1876), Bluntschli (1881), and Fiore (1919). See generally, Wetzel and Rauschning, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978), at 20. See also the Harvard Draft Convention of 1935 on the Law of Treaties, prepared by the Harvard Research on International Law, reprinted in 29 *AJIL* (Supplement) 657 (1935).

¹⁹ General Assembly Resolution 174(II) of November 1947 established the ILC. The task of the ILC was to promote the progressive development of international law and its codification.

²⁰ A helpful list of these reports is contained in Watts, *The International Law Commission 1949-1998, Volume Two: The Treaties* (1999), at 617. The Special Rapporteurs were as follows: Brierly (three reports, 1950-52); Lauterpacht (two reports, 1953-54); Fitzmaurice (five reports, 1956-60); and Waldock (six reports, 1962-66). Fitzmaurice's reports differed from the others in that, somewhat controversially, they proceeded to restate the law in the form of an expository code. He considered the topic unsuitable for codification in the form of a convention. See *YILC* (1966-II), at 176, para. 23. As regards the activities of the ILC concerning the law of treaties, see generally Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (1970), at 32-41; and Sinclair, *The International Law Commission* (1987), at 56-8.

²¹ The final draft articles are contained in 'Report of the International Law Commission on the work of its eighteenth session', 4 May – 19 July 1966, UN Doc. A/6309/Rev.1, *YILC* (1966-II), at 177; reprinted in 61 *AJIL* 263 (1967). As for the recommendation to convene a conference, see *YILC* (1966-I), at 322, paras. 17-8 (892nd meeting); and *YILC* (1966-II), at 177, para. 36.

²² See GA Resolution 2166 (XXI) of 5 December 1966, reprinted in 61 *AJIL* 656 (1967); and GA Resolution 2287 (XXII) of 6 December 1967.

1968 and 1969.²³ On 22 May 1969, the Vienna Conference adopted the Vienna Convention, the text of which in large measure mirrored the ILC's final draft articles.²⁴ The Convention was opened for signature on the following day. It entered into force on 27 January 1980 in accordance with Article 84 following Togo's deposit of the thirty-fifth instrument of ratification. By the end of 2009, 114 State parties had ratified the Convention.

14. The Vienna Convention has codified the greater part of treaty law. Its scope covers, *inter alia*, the rules relating to the formation, entry into force, interpretation, invalidity and termination of treaties.²⁵ Save for a few exceptions, the Vienna Convention applies to both bilateral and multilateral treaties.²⁶ It does not apply to agreements between States and private entities, even if such agreements provide that they shall be interpreted by reference to rules of international law.²⁷ Aside from the requirement that the treaties it covers are to be in writing, the Convention does not specify other requirements of form. This leaves open the possibility that documents

²³ The sessions were held at the Neue Hofburg in Vienna. The first session was held from 26 March to 24 May 1968 (at which 103 States were represented) and the second session from 9 April to 22 May 1969 (at which 110 States were represented). See Final Act of the United Nations Conference on the Law of Treaties, 23 May 1969, UN Doc. A/CONF.39/26, at paras. 2 and 3, reprinted in VCOR (Documents), at 283. As regards the procedure and work of the conference, see Rosenne, *supra* note 20, at 63-91.

²⁴ See Watts, *supra* note 20, at 611. The Vienna Convention was adopted by 79 votes to 1 with 19 abstentions. France was the lone State to vote against the Convention. VCOR (Second Session), 206-7, paras. 51-3 (36th plenary meeting).

²⁵ Areas not covered by the Convention's scope include treaties between States and international organizations, agreements and effects on treaties in circumstances of State succession or on the outbreak of hostilities between States. See Articles 3 and 73 of the Vienna Convention. See also, Rosenne, *supra* note 20, at 41-6; Watts, *supra* note 20, at 612; and *The International Law Commission Fifty Years After: An Evaluation*, Proceedings of the Seminar held to commemorate the fiftieth anniversary of the International Law Commission, 21-22 April 1998 (New York: United Nations 2000), Ch. IV "Law of Treaties: Questions Remain Open", at 73-110; Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), at 1-84 (concerning unaddressed issues). As regards the writing requirement, see Article 2(1)(a) of the Vienna Convention. Nonetheless, international law permits oral agreements but these are rarely concluded. See *Legal Status of Eastern Greenland*, PCIJ, Ser. A/B, No. 53 (1933), p. 36; and *Salini v Jordan (Award)*, at para. 77 *et seq.* Treaties to which international organisations are parties are addressed in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, ILM 543 (1986).

²⁶ Article 60 (1) is limited to bilateral treaties and Articles 40, 41, 58 and 60(2) expressly relate to multilateral treaties. See Aust, *supra* note 4, at 9.

²⁷ See Greenwood, 'State Contracts in International Law – The Libyan Oil Arbitrations', (1982) 53 *BYBIL* 27.

such as a joint communiqué may constitute a treaty within the meaning of the Vienna Convention.²⁸

2. *Treaty Law as Customary International Law*

15. The two essential elements of customary international law are (1) a general convergence in the practice of States from which a settled practice can be extracted, and (2) a subjective element or *opinio juris*. They were described by the ICJ in the *North Sea Continental Shelf* cases as follows:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.²⁹

16. Once these two criteria are satisfied, the generally accepted consequence is that the relevant rule becomes customary international law. An important aspect of a customary rule expressed in a treaty is that it ordinarily binds all States, including those not party to that treaty. As Malcolm Shaw has succinctly explained: ‘where

²⁸ See *Aegean Sea Continental Shelf* case, (Greece v Turkey), ICJ Reports 39 (1978), at para. 96, and *Qatar v Bahrain* ICJ Reports 112 (1978), at para. 25; and *Salini v Jordan* (Award), at para. 76. See generally Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), at 85–134.

²⁹ (Germany v Denmark/Germany v Netherlands) ICJ Reports 3 (1969), at para. 77. See also Pellet, ‘Article 38’, in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 677 (2006), at 748–764; and *Oppenheim*, *supra* note 4, at 25–31.

In *Pope & Talbot (Damages)*, at para. 59, the tribunal observed that ‘[i]t is a facet of international law that customary international law evolves through state practice. International agreements constitute practice of states and contribute to the grounds of customary international law.’ See also *Mondev*, at para. 111 (as to *opinio juris*) and para. 117 (as to the influence of the considerable number of BITs). Annex A of the 2004 United States Model BIT defines customary international law in the following terms: ‘[t]he Parties confirm their shared understanding that “customary international law” ... results from a general and consistent practice of States that they follow from a sense of legal obligation’.

treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law'.³⁰

17. In connection with the Vienna Convention, the majority view prevailing today considers that it is, as a whole, reflective of customary international law.³¹ The authoritative nature of the Vienna Convention is demonstrated by the following remark by Aust:

When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the [Vienna Convention], the rules set forth in the [Vienna Convention] are invariably relied upon even when the states are not parties to it. The writer can recall at least three bilateral treaty negotiations when he had to respond to arguments of the other side which relied heavily on specific articles of the [Vienna Convention], even though the other side had not ratified it.³²

18. Aust takes the point further by observing that while the ICJ in the *Gabčíkovo-Nagymaros Project* case³³ applied Articles 60 to 62 of the Vienna Convention as customary law,

it is reasonable to assume that the Court, will take the same approach in respect of virtually all of the substantive provisions of the Vienna Convention. There has been yet

³⁰ Malcolm Shaw, *International Law* (2003), at 90.

³¹ As to Vienna Convention provisions the ICJ has specifically indicated as expressive of customary international law, see the *Namibia* case, ICJ Reports (1971), at 47, para. 94 (concerning Article 60(3)); *Fisheries Jurisdiction* case, Judgment, (U.K. v. Iceland) ICJ Reports 3 (1973), at 14 and 18, paras. 24 and 36, (concerning Articles 52 and 62); *Fisheries Jurisdiction* case, Judgment, (F.R.G. v. Iceland) ICJ Reports 49 (1973), at 63, para. 36, (concerning Article 62); *Aegean Sea* case, ICJ Reports (1978), at 39, para. 95 (concerning Articles 2, 3 and 11); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980), at 94-5, para. 47 (concerning Article 56(2)); *Frontier Dispute*, ICJ Reports (1986), at 563, para. 17 (concerning Article 62); *Border and Transborder Armed Actions*, ICJ Reports (1988), at 85, para. 35 (concerning reservations); and *Gabčíkovo-Nagymaros Project* case, Judgment, ICJ Reports 7 (1997), at 38 and 62, paras. 46 and 99 (concerning Articles 60-62). For pronouncements by the ICJ on the customary nature of Articles 31 to 33 of the Vienna Convention, see *infra* note 116.

Concerning FIAT jurisprudence on the status of the Vienna Convention, the *Eureko* tribunal had occasion to observe that the Vienna Convention represented '[t]he authoritative codification of the law of treaties ... a treaty in force among the very great majority of the States of the world community'. *Eureko*, at para. 247.

³² Aust, *supra* note 4, at 10-11. It has been suggested that the Convention's influence on the practice of foreign ministries throughout the globe is to some extent attributable to the participation of most of their international law experts at the Vienna Conference. Wetzel and Rauschning, *supra* note 18, at 12.

³³ ICJ Reports 7 (1997).

no case where the Court has found that the Vienna Convention does not reflect customary law.

...

[t]o attempt to determine whether a particular provision on the Vienna Convention represents customary international law is now usually a rather futile task. As Sir Arthur Watts has said in the foreword to this book, the modern law of treaties is now authoritatively set out in the Convention.³⁴

19. Although the Vienna Convention has gained wide acceptance, many nations are still not signatories to it.³⁵ In this regard, the requirement of consent in international law mandates that States not party to a treaty are not bound by its terms.³⁶ However, as discussed above, this principle of treaty law is generally inapplicable to those parts of treaties that express rules of customary international law. Consequently, because most, if not all, of the Vienna Convention provisions reaffirm customary international law, the content of those provisions bind States that are not parties to the Vienna Convention.

C. RELEVANT TREATIES

1. *ICSID Convention*

20. The prodigious rise of foreign investment arbitration (also known as investment treaty arbitration or investor-State arbitration) owes a great deal to the

³⁴ Aust, *supra* note 4, at 11. Notwithstanding this, reference must be made to Sinclair, *supra* note 6, at 12-18, in which attention is drawn to a number of the Vienna Convention's provisions that appeared to him—at the time he wrote—to involve a progressive development of international law rather than a codification of customary law. To examine whether the provisions pointed out by Sinclair have in the intervening period become accepted into the fold of customary international law rules is beyond the scope of this thesis, save to note that more recent publications, such as Aust's, indicate that those provisions have been accepted as such.

³⁵ McDade has suggested that the major reason for a State not to have ratified the Vienna Convention is 'the requirement for the acceptance of compulsory procedures for the settlement of disputes, rather than any fundamental disagreement with the Convention's provisions.' McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969, 35 *ICLQ* 499 (1986), at 503.

³⁶ See Articles 26 and 34 of the Vienna Convention. See also the obligation set out in Article 18 of the Vienna Convention not to defeat the purpose of a treaty signed but not yet entered into force.

ICSID Convention³⁷ and the promotion of its dispute resolution mechanism by the International Centre for Settlement of Investment Disputes ('ICSID').³⁸

21. The World Bank was responsible for the negotiation and formulation the ICSID Convention. Aron Broches, then the World Bank's General Counsel (later to become ICSID's first Secretary-General), has been considered as the ICSID Convention's principal architect.³⁹ He set out the basic idea of the Convention in a note to the World Bank's Executive Directors in August 1961. The drafting of the Convention took place during the years 1961 to 1965.⁴⁰ On 18 March 1965, the final text of the Convention was approved by the World Bank Executive Directors and transmitted to all member governments of the World Bank. It entered into force on 14 October 1966.⁴¹

22. It is well accepted that '[t]he purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and host States

³⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted 18 March 1965, entered into force 14 October 1966; 575 *UNTS* 159; 4 *ILM* 532 (1965); 60 *AJIL* 892 (1966); 22 *Annuaire Suisse de Droit International* 221 (1965); 93 *Journal du Droit International* 50 (1966); and 1966 *Naciones Unidas Anuario Juridico* 211.

³⁸ The first ever registration of an ICSID case was made in 1972. From that year up to 1986, only 21 arbitrations were registered with ICSID. In contrast to those initial 14 years, almost 190 registered cases were registered in the following 19 years (1987 to June 2006). These figures are derived from the list of cases posted on ICSID's website <www.worldbank.int/icsid/cases/cases.htm> and do not take into account foreign investment arbitrations conducted outside ICSID's auspices. See generally, Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *ratione temporis*', 4 *Law and Practice of International Courts and Tribunals* 19 (2005). With respect to earlier concerns as to the under-utilization of ICSID, see, e.g., Tooze, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (1990), at 253.

³⁹ See Schreuer, *supra* note 5, at 2.

⁴⁰ A considerable portion of the preparatory work has been documented by ICSID in the following four volumes: *History of the ICSID Convention* (Washington, D.C.: International Centre for Settlement of Investment Disputes 1968-1970) Vol. I: *Analysis of Documents Concerning the Origin and the Formulation of the Convention* (1970); Vol. II (in two parts): *Documents Concerning the Origin and the Formulation of the Convention* (in English) (1968); Vol. III: *Documents Relatifs à l'Origine et à l'Elaboration de la Convention* (in French) (1968); Vol. IV: *Documentos Relativos al Origen y a la Formulación del Convenio* (in Spanish) (1969).

⁴¹ See generally, Schreuer, *supra* note 5, at 2-4, and for the role of the World Bank, see Sutherland, 'The World Bank Convention on the Settlement of Investment Disputes', 28 *ICLQ* 367 (1979), at 373-78.

alike’.⁴² In pursuit of this goal, ICSID was established to provide facilities that would assist in the process of settling investment disputes between an ICSID State and nationals of other ICSID States.⁴³ The Convention offers a procedural framework pursuant to which these disputes can be resolved but does little to determine substantive legal issues involved in such disputes.

23. The Convention alone does not enable an investor to bring a claim against the host State. By virtue of Article 25 of the ICSID Convention, both the investor and the host State must have consented to the jurisdiction of the Centre. In practical terms, this often means that there must be—in addition to the Convention—consent provided either under an investor-State arbitral agreement or through a treaty that makes a standing offer to investors wishing to pursue a claim against a host State under ICSID’s dispute settlement mechanism. Where such a standing offer is made, an investor usually accepts this offer by lodging a claim with ICSID, which creates the requisite consensual bond between the investor and host State.

24. The law applicable to ICSID Convention disputes is dealt with in Article 42(1) of the Convention:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

25. Under this provision, a foreign investor and a State are left with wide latitude to choose the law that shall govern their dispute.⁴⁴ However, limitations such as

⁴² Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331 (1972-II), at 348. See also the Executive Directors’ Report, para. 12 (‘adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention’).

⁴³ See, e.g., Article 1 of the ICSID Convention.

⁴⁴ For a case where the parties failed to agree either domestic or international law as the applicable law, see, *Auconen (Award)*, at para. 100. As to the scope of the reference in Article 42(1) to ‘rules’ of international law rather than simply ‘international law’, see Blase, ‘Proposing a New Road Map for an Old Minefield: The Determination of the Rules Governing the Substance of the Dispute in International

mandatory domestic rules⁴⁵ and the supplemental and corrective functions of international law⁴⁶ may limit this choice or the extent of the law chosen. In a case where a claim is based not on an agreement negotiated between an investor and a host State but on a BIT, that treaty is generally considered the primary source of the applicable legal rules⁴⁷ and to the extent that there may be any inconsistency between the domestic law and public international law, the latter prevails.⁴⁸

26. With respect to the law applicable to the interpretation of a treaty—and this is true not just for the ICSID Convention but for all other investment treaties—it is well settled that international law and not contractual or statutory interpretation rules apply.⁴⁹

Commercial Arbitration’, 20 *Journal of International Arbitration* 267 (2003), at 269 (contending that this reference extends to ‘general principles of law’ and ‘rules of national justice’).

⁴⁵ It is not uncommon for States to prohibit the contractual waiver of aspects of its administrative, labour, monetary, regulatory or penal law. See Feuerle, ‘International Arbitration and the Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes’, 4 *Yale Studies in World Public Order* 89 (1977), at 108.

⁴⁶ See *Klöckner (Annulment)*, where the *ad hoc* Committee considered that the requirement in Article 42(1) that ‘the Tribunal shall apply the law of the Contracting State party to the dispute ... and such principles of international law as may be applicable’ gave those international principles:

a dual role, that is *complementary* (in the sense of a ‘lacuna’ in the law of the State), or *corrective*, should the State’s law not conform on all points to the principles of international law’. 2 ICSID Reports 122 (original emphasis).

See also *Aucoven (Award)*, at para. 100; *Amco (Resubmitted Award)*, (1990) 1 ICSID Reports 569, at 580, para. 40; and *Amco (Annulment)*, (1986) 1 ICSID Reports 509, at 515, para. 18.

⁴⁷ See, *AAP*, at 4 ICSID Reports at 256.

⁴⁸ See, e.g., *Santa Elena (Award)*, at para. 64. See generally, Schreuer, *supra* note 5, at 622-631; Chukwumerije, ‘International Law and Article 42 of the ICSID Convention’, 14 *Journal of International Arbitration* 79 (1997); and Weiler, ‘Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico’, in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 701 (2005), at 720-722.

⁴⁹ See, e.g., *Exchange of Greek and Turkish Populations*, PCIJ, Ser. B, No. 10 (1925), at 17 (‘the difference of opinion which has arisen regarding the meaning and scope of the word ‘established’, is a dispute regarding the interpretation of a treaty and as such involves a question of international law. It is not a question of domestic concern ...’); and the *Van Bokkelen* case (1888) (‘for the interpretation of treaty language and intention, whenever controversy arises, reference must be made to the law of nations and to international jurisprudence’). See also *AAP*, at para. 39; and *Amco (Annulment)*, at para. 18.

2. *Bilateral Investment Treaties*

27. Bilateral treaties that touch upon commerce and foreign investments are not, in general, a recent development. The United States, for example, entered into a Treaty of Amity and Commerce with France in 1778.⁵⁰ During the last century, friendship, commerce and navigation ('FCN') treaties were a common form of bilateral agreement between States. However, in the 1960s and 1970s, they seemed to lose favour as developing States appeared to become sceptical as to the benefits to be derived from them.⁵¹

28. FCN treaties tended to deal with a variety of different matters, including consular rights, the freedom of navigation of vessels, and the protection of nationals of one contracting State in the territory of the other. BITs, in contrast, focus specifically on foreign investment. On the whole, BITs aim to create a stable legal environment for the protection of foreign investment and seek to increase the amount of foreign capital flowing into host States by utilizing international legal rules and effective enforcement mechanisms provided under the legal framework established by the ICSID Convention.⁵²

29. Germany and Pakistan share the distinction of signing the first BIT in 1959.⁵³ After a relatively slow start, the conclusion of BITs began to accelerate in the 1970s.

⁵⁰ See Walker, 'Modern Treaties of Friendship, Commerce and Navigation', 42 *Minnesota Law Review* 805 (1958), at 805.

⁵¹ Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries', 24 *International Lawyer* 655 (1990), at 657. In relation to British post-Second World War treaty practice, Professor Schwarzenberger has identified seven types of treaty that covered to some degree foreign investment protection. These included peace settlements, general economic and commerce treaties, and nationalisation agreements. Georg Schwarzenberger, *Foreign Investments and International Law* (1969), at 30, *et seq.*

⁵² Salacuse, *ibid.*, at 661.

⁵³ Pakistan and Federal Republic of Germany: Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), 457 *UNTS* 23 (1963). This was signed at Bonn on 25 November 1959 and entered into force on 28 November 1962. See Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', 92 *AJIL* 621 (1998), at 627. The first BIT to enter into force was between Germany and the Dominican Republic, signed on 19 December 1959 and entered into force on 3 June 1960. *Ibid.* The lead that Germany took in developing this new type of investment treaty may be attributed to the loss of all its foreign investments in the wake of the Second World War and the need to generate a new investment program. Salacuse, *supra* note 51, at 657. See also Kenneth J. Vandevelde,

Several European States and some non-Western capital-exporting States started to conclude BITs in that decade.⁵⁴ The United States signed its first BIT—the US-Egypt BIT—in 1982.⁵⁵ In the 1990s, another wave of BIT negotiations occurred as a result of the collapse of the Soviet Union.⁵⁶ The dramatic rise in the popularity of BITs becomes apparent when the average of approximately 7 BITs signed per year between 1959 through 1968 is contrasted with the average signature of 146 BITs per year in the 1990s.⁵⁷ By the end of 2008, the total number of BITs amounted to 2,676.⁵⁸

30. The proliferation of BITs in the past two decades is a remarkable phenomenon. Not only are the treaties by sheer weight of numbers beginning to influence international law,⁵⁹ they have been the instruments out of which dozens of investment

'A Brief History of International Investment Agreements', 12 *U. C. Davis Journal of International Law and Policy* (2005), at 157

⁵⁴ See Vandevelde, *supra* note 53, at 628; and Salacuse, *supra* note 51, at 658.

⁵⁵ Various explanations are offered for the delay of the United States to commence its BIT program. Vandevelde, at 627-8, explains that the United States launched its program in 'direct response' to the United Nations General Assembly debates on the measure of compensation for expropriation (full compensation being asserted by developed nations, less than full by developing nations and some Marxist nations even claiming no compensation should be due). In contrast, Salacuse, *supra* note 51, at 657, indicates that the US program was commenced because it was encouraged by the experience of European States.

⁵⁶ Vandevelde, *supra* note 53, at 628. That commentator suggests BITs were a relatively easy means to for Central and Eastern European economies to renounce Marxist economics and to introduce liberal economic practices. See also *Plama (Jurisdiction)*, at para 195 ('[i]n the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration').

⁵⁷ See UNCTAD, 'International Investment Rule-Making: Stocktaking, Challenges and the Way Forward', UN Doc. UNCTAD/ITE/IIT/2007/3 (2008), at 23; and Vandevelde, *supra* note 53, at 627-628.

⁵⁸ See UNCTAD, 'Recent Developments in International Investment Agreements', IAA Monitor No. 3 (2009), at 2, UN Doc. UNCTAD/WEB/DIAE/IA/2009/8 and UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment and Rulemaking', UN Doc. UNCTAD/ITE/IIA/2007/3 (2007), at 3,. See also *Eureko*, at para. 258.

⁵⁹ See, e.g., *Eureko*, at para. 258 (indicating that contemporary customary international law 'has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties'); Lowenfeld, 'Investment Agreements and International Law', 42 *Columbia Journal of Transnational Law* 123 (2003-2004), at 128 ('the mass of almost identical bilateral investment treaties constitutes international legislation, though it does not quite fit the traditional classification of international law into two categories—customary law and treaty law.') and at 130 ('the undertaking of legal obligations by a large group of states, even from a mixture of motives, has resulted in something like customary international law'); and Rubins and Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (2005), at 190 ('the contours of customary international law have evolved through the enactment and application of investment treaties'). See also Schwebel, 'The Reshaping of the International Law of Foreign Investment by Concordant Bilateral Investment

arbitrations have spawned. In turn, the jurisprudence emerging from these arbitrations are making (as this thesis will show) a significant contribution to international law.

3. *Multilateral Treaties*⁶⁰

31. The 1992 North American Free Trade Agreement⁶¹ (NAFTA) is multilateral treaty that deals with a broad range of subjects, including intellectual property and trade in services, much of which has no direct relevance to foreign investment disputes. Investment arbitration is addressed in Chapter 11 of the NAFTA, which deals with measures relating to foreign investment and establishes a regime for the settlement of investor-State disputes within the scope of its provisions.⁶²

32. Article 1131 of NAFTA identifies the applicable law for investment arbitration disputes under Chapter 11. It states that

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.⁶³

33. Of special relevance to this thesis is the comment on this provision by the tribunal in *Waste Management*:

The thrust of this Article permits this Arbitral Tribunal to be guided, in matters of interpretation, by the rules laid down by the Vienna Convention on the Law of Treaties

Treaties', in Charnovitz, Steger, and van den Bossche, (eds.), *Law in the Service of Human Dignity – Essays in Honour of Florentino Feliciano* 241 (2005).

⁶⁰ For a general summary of this topic see Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (2004), at 63-70.

⁶¹ Signed 12 December 1992, entered into force 1 January 1994, 32 *ILM* 296 and 605.

⁶² See generally Alvarez, 'Arbitration under the North American Free Trade Agreement', 16 *Arbitration International* 393 (2000); and Trakman, 'Arbitrating Investment Disputes under the NAFTA', 18 *Journal of International Arbitration* 385 (2001). It should be noted that some of the NAFTA claims that fall within the Chapter 11 investment provisions could also be seen as falling within the ambit of the trade-in-goods provisions. See Wälde and Weiler, 'Investment Arbitration under the Energy Charter Treaty in the Light of the New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation', in Kaufmann-Kohler and Stucki (eds.), *Investment Treaties and Arbitration*, Swiss Arbitration Association Conference, 25 January 2002 (ASA Special Series No. 19), p. 159, at 184.

⁶³ Related to this provision is Article 102(2) which specifies that the parties shall interpret and apply its provisions 'in the light of [NAFTA's] objectives set out in [Article 201(1)] and in accordance with applicable rules of international law'.

signed on 23 May 1969, which establishes the general rule of interpretation of treaties at Article 31 ...⁶⁴

34. The NAFTA, like BITs, has generated a number of investment arbitrations. A growing number of investment arbitrations are also being instituted under the 1994 Energy Charter Treaty.⁶⁵ The ASEAN Agreement for the Promotion and Protection of Investments⁶⁶ also requires mention as a relevant multilateral treaty because one investment arbitration has been instituted under it.⁶⁷

⁶⁴ *Waste Management (Award)*, at para. 9. See also *Methanex (Partial Award)*, at para. 100.

⁶⁵ As at 22 November 2009, the Energy Charter Secretariat listed 23 ECT investor-State dispute settlement cases. See www.encharter.org. See generally, Wälde, 'Investment Arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation', 12 *Arbitration International* 429 (1996); and Wälde and Weiler, *supra* note 62, at 183. Article 26(6) of the Energy Charter Treaty provides:

A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

⁶⁶ 15 December 1987, 27 *ILM* 612 (1988) and amended by the Protocol to Amend the Agreement for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

⁶⁷ *Yaung Chi Oo Trading v Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1.

Chapter II

TREATY INTERPRETATION

Chapter outline: The purpose of Chapter II is to survey the history of treaty interpretation, to discuss the development of the Vienna Convention Rules and describe how they are currently accepted as rules of international law. This background information will facilitate a deeper understanding of the Chapter III and IV examination of the Vienna Convention Rules.

Section A of this Chapter provides a history of treaty interpretation rules prior to the Vienna Convention Rules. Section B describes how those Convention Rules developed. Section C examines the criticisms that have been levelled against those Rules. Section D demonstrates that the Vienna Convention Rules are now considered to express customary international law. Sections E, F and G address, respectively, the distinction between interpretation and application of treaties, who may interpret treaties and what types of instruments may be interpreted by treaty interpretation rules.

A. PRE-VIENNA CONVENTION TREATY INTERPRETATION RULES

35. Rules of treaty interpretation have been used by States for hundreds, if not thousands, of years. David Bederman suggests that the Greeks were the first of the ancient civilizations to develop rules of treaty interpretation.⁶⁸ Up to around 700 BC, little is known about treaty interpretation practices. Historical records indicate that

⁶⁸ Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (2001), at 50.

from this time until about 300 BC the ancient Greeks practised an extremely literal construction technique known as sophistic interpretation.⁶⁹

36. Over the centuries, a diverse but unsystematic range of rules and approaches developed. Many distinguished international lawyers expended a good deal of energy to give coherence to this body of interpretative rules.⁷⁰ Municipal law rules on the interpretation contracts and statutes significantly influenced the content of these early rules.⁷¹

37. At the turn of the 20th century, Oppenheim went so far as to observe in the first edition of his classic treatise that '[n]either customary nor conventional rules of International Law exist concerning interpretation of treaties'.⁷² One publicist in the 1930s described the situation at that time as follows:

The interpretation of treaties is, perhaps, one of the most confused subjects in international law to-day. Many a publicist, influenced by the great classics of Grotius and Vattel, seems inclined to over-emphasize the classical canons of construction without carefully examining their practical usefulness. Jurists and judges, trained in various systems of private law, are not infrequently prejudiced by rules of their own judicial systems. Even careful students of international law, who have spent years in analysing judicial decisions of international and national tribunals, are sometimes misled by a mere dictum. Consequently, conflicting and even contradictory views are expressed on the subject; and this state of confusion needs immediate clarification.⁷³

⁶⁹ Wheeler, 'Sophistic Interpretations and Greek Treaties', 25 *Greek, Roman and Byzantine Studies* 253 (1984), at 255; and Bederman, *International Law in Antiquity* (2001), at 176-7.

⁷⁰ See, e.g., Grotius, *De Jure Belli ac Pacis* (1646), Ch. XVI 'On Interpretation'; and Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, (1758), Bk. II, Ch. XVII, 'The Interpretation of Treaties'.

⁷¹ See, e.g., *Boundaries in the Island of Timor* (1914), 1 Hague Court Reports, 354, at 365 ('[p]rinciples of interpretation are, by and large, and *mutatis mutandis*, those of the interpretation of agreements between individuals, principles of common sense and experience, already formulated by the Prudents of Rome'). See also, *YILC* (1966-II), at 218, para. 3; and *Oppenheim*, *supra* note 4, at 1269.

⁷² Oppenheim, *International Law: A Treatise* (1905), Vol. I. 'Peace', at 559-60. See also, Westlake's opinion:

The interpretation of treaties has been considered at much length by many writers on international law, and rules on it have been suggested which in our opinion are not likely to be of much practical use.

Westlake, *International Law* (1904), at 282.

⁷³ Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), at 19.

38. The diversity of treaty interpretation rules and approaches led to great uncertainty; it was not clear when any one or a combination would be used by a tribunal to interpret a treaty; no established order of importance of application guided the interpreter; and they were easily susceptible to misapplication. In the 1960s, Lord McNair expressed the view that in the domain of treaty interpretation there had emerged ‘a wilderness of conflicting decisions of tribunals and opinions of writers’.⁷⁴ A general criticism levelled at this jurisprudential ‘wilderness’ was that if one rule of interpretation were invoked by a party, the opposing party could just as equally rely on another to contradict or counter it.⁷⁵ Certain rules also became associated with exceptions or variations so detailed that, in the opinion of some, the original rule was left unrecognisable.⁷⁶ Further, some commentators questioned the rules of interpretation, considering their application an illusory construct employed to justify the conclusion that the tribunal desired to reach for altogether independent reasons.⁷⁷ Others held the view that an international tribunal must not be bound by hard and fast rules of interpretation as ‘none of them can be of rigid and universal application’.⁷⁸

⁷⁴ McNair, *supra* note 7, at 366. See also Sir Eric Beckett, ‘Comments [on the report by Hersch Lauterpacht]’, 43 *AIDI* 435 (1950-1), at 435; and Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), at 643.

⁷⁵ See, e.g., Professor Verzijl’s lecture at the Royal Netherlands Academy of Science (*Mededeelingen der Afdeling Letterkunde, Nieuwe Reeks DI, No. 2*), at 144 (‘[i]n principle [the rules of interpretation employed by the PCIJ] are all correct, but on concrete application they often abrogate each other and frequently appear worthless ...’), quoted in Andreae, *An Important Chapter from the History of Legal Interpretation* (1948), at 75. The existence of these matching opposites in interpretative rules have been seen as a system of checks and balances that offers protection against extremes. See Weeramantry, *The Law in Crisis: Bridges of Understanding* (1975), at 151.

⁷⁶ Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’, 28 *BYBIL* 1 (1951), at 2.

⁷⁷ See, e.g., Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 26 *BYBIL* 48 (1949), at 53 (rules of interpretation ‘are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means’ and ‘[t]he very choice of any single rule or of a combination or cumulation of them is the result of a judgment arrived at, independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy within the orbit of the express or implied intention of the parties or of the legislature’). See also Yü, *The Interpretation of Treaties* (1927), at 27-39; Stone, ‘Fictional Elements in Treaty Interpretation – a Study in the International Judicial Process’, 1 *Sydney Law Review* 344 (1953-1955), at 355-7; Fairman, ‘The Interpretation of Treaties’, 20 *Transactions of the Grotius Society* 123 (1935), at 134; and Salvioli, ‘Comment’ on Report of Lauterpacht, 43(1) *AILI* 453 (1950), at 454.

⁷⁸ Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), at 642.

Some also did not consider that rules of interpretation were ‘a secure safeguard against arbitrariness or partiality’.⁷⁹

39. In reaction to these problems, calls were made for a simpler and more coherent body of rules. It was suggested by some that the rules be reduced to two or three basic general principles, leaving the ultimate choice to the good faith and common sense of the interpreter.⁸⁰ Others favoured a fixed set of rules that had a definitive order or hierarchy.⁸¹ Debate was also taking place as to the usefulness of treaty interpretation rules.

40. Given this unsettled legal environment, when the ILC had started to examine the subject of treaty interpretation in the 1960s, the time was fully ripe for a formulation of an authoritative set of generally applicable treaty interpretation rules.⁸²

B. DEVELOPMENT OF VIENNA CONVENTION TREATY INTERPRETATION RULES

41. Of the eighty-five articles that constitute the text of the Vienna Convention, just three—Articles 31 to 33—are devoted solely to treaty interpretation. These are set out in Chapter III, Section 3 of the Vienna Convention and are of signal importance to this thesis.

⁷⁹ Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 26 *BYBIL* (1949), at 53. See also Stone, ‘Fictional Elements in Treaty Interpretation – a Study in the International Judicial Process’, 1 *Sydney Law Review* 344 (1953-1955), at 360. But see, e.g., Beckett, ‘Comments [on the report by Lauterpacht]’, 43(I) *AIDI* 435 (1950), at 436 ([t]he fundamental reason for the existence of rules of interpretation ... is to defend the court from the charges of reaching its conclusions on arbitrary or subjective grounds ... an international court, above all others, has to be free from the suspicions of deciding cases on [those] grounds.’).

⁸⁰ In this regard, see Pollux, ‘The Interpretation of the Charter’, 23 *BYBIL* 54 (1946), at 70-70. See also Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1942), at 199.

⁸¹ See, e.g., the rules of interpretation formulated by Professor Verzijl in the *Georges Pinson* case, France-Mexico Claims Commission, (1927-1928) *Annual Digest* 426, Case No. 292, at 426-7; 5 *RIAA* 327 (1928), at 422; and Fitzmaurice’s ‘Chief Principles of Interpretation Applied by the [ICJ]’, in Fitzmaurice, *supra* note 76, at 9.

⁸² Coincidentally, it was also at about this time that Karl Llewellyn produced his critique on cannons of statutory interpretation showing that for each cannon, there usually existed an equal and contradictory cannon. See Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960), at 521-535.

42. The genesis of those treaty interpretation provisions may be traced back to the Institute of International Law's work on the interpretation of treaties from 1950 to 1956.⁸³ In 1956, the Institute adopted a resolution that distilled the rules of treaty interpretation into two articles.⁸⁴ Although those rules did not gain general acceptance, the Institute's study of the topic was a precursor to the ILC's work on codifying the rules of treaty interpretation, which commenced in 1964.⁸⁵

43. The major components of the ILC's work on treaty interpretation are found in (i) Waldock's Third Report as Special Rapporteur to the ILC, (ii) the ILC's 1964 draft articles on the law of treaties, and (iii) the ILC 1966 draft articles on the law of treaties.⁸⁶ The latter contained the final version of the ILC's rules on treaty interpretation (numbered there as Articles 27 to 29), which were adopted by the Vienna Conference virtually unchanged as Articles 31 to 33 of the Vienna Convention.⁸⁷ As the *Ethyl* tribunal has noted, the Vienna Conference adopted the Vienna Convention Rules without a dissenting vote.⁸⁸

⁸³ The work of the Institute on this topic is reported in Lauterpacht, 'De l'interprétation des traités: Rapport et projet de Résolutions', 43(I) *AIDI* (1950), at 366-460; Lauterpacht, 'De l'interprétation des traités: Observations complémentaires et projet définitif de Résolutions', 44(I) *AIDI* (1952), at 197-223 and 44(II) *AIDI* (1952), at 359-406; Lauterpacht, 'De l'interprétation des traités: Nouveau projet définitif de Résolutions', 45(I) *AIDI* (1954), at 225-230; and Fitzmaurice, 'De l'interprétation des traités', 46 *AIDI* 317 (1956).

⁸⁴ The resolution on treaty interpretation is set out in 46 *AIDI* (1956), at 358-9, 364-5 and reproduced in Annex II hereto.

⁸⁵ Rosenne, *supra* note 20, at 40. It should be noted here that two of the authors of the Institute's report on the subject became ILC Special Rapporteurs in relation to its work on the law of treaties. See *supra* note 20.

⁸⁶ Sir Humphrey Waldock's Third Report as ILC Special Rapporteur on the law of treaties, UN Doc. A/CN.4/167 and Add. 1-3 (1964) (specifically Articles 70-75), which was significantly redrafted in the ILC's 1964 draft articles on the law of treaties (there numbered as Articles 69-73). See Annex II.

⁸⁷ See Annex I for a comparison between the rules of interpretation as found in the 1966 ILC draft articles on the law of treaties and the those found in the Vienna Convention. See also Rosenne, *supra* note 20, at 40.

⁸⁸ *Ethyl (Jurisdiction)*, at para. 52. However, in the vote for the adoption of the whole treaty, one dissenting vote (by France) was recorded. See *supra* note 24.

44. The ILC's work did not draft any fundamentally new rules of interpretation. It drew on rules and practice that prevailed at the time it was considering the topic. In its own words:

the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties.⁸⁹

45. Its main contribution to treaty interpretation law was to synthesise the unwieldy body of diverse treaty interpretation rules (as discussed above) into one set of coherent and systematic rules acceptable to all States and applicable in a wide range of circumstances.⁹⁰ As Thirlway has explained, the work of the ILC went beyond the jurisprudence of the ICJ because the Court did not have the opportunity to organise canons of interpretation

into an articulated system, and it was of course this that the ILC Rapporteurs were able to contribute. In its decisions, the Court frequently refers to a specific principle of interpretation, but does not set out any sort of structural system for the hierarchy or interaction of those principles.⁹¹

46. The long-term consequence of the establishment of the rules was significant—they did away with each international tribunal called upon to interpret a treaty having to conduct a re-examination of the old conflicting rules of the pre-Vienna Convention days, as was the approach adopted by the *AAP* tribunal.⁹²

⁸⁹ *YILC* (1966-II), at 218-9, para. 5.

⁹⁰ Although there had been codifications of interpretational rules prior to the work of the ILC, see *supra* notes 70 and 81, these codifications failed to gain wide acceptance by international courts and tribunals as definitive expressions of the rules of interpretation.

⁹¹ Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Three', 62 *BYBIL* 1 (1991), at 17. While the ICJ did not lay down a hierarchy or interaction of the principles, some Judges in their individual opinions came closer to doing so. See, e.g., Judge de Castro in the *Namibia* case, ICJ Reports (1971), pp. 182 ff.; and Sir Percy Spender, in the *Certain Expenses* case, ICJ Reports (1962), pp. 184 ff.

⁹² See Chapter VI, Section A.

C. CRITICISM OF THE VIENNA CONVENTION RULES

a) International Law

47. The Vienna Convention Rules have not been free from criticism. One of its principal critics during the Vienna Conference was Professor McDougal, a member of the United States delegation to that Conference. He criticised the subordination of the principles contained in Article 32 to those contained in Article 31.⁹³ To him, Articles 31 and 32 were too restrictive in the sense that they excluded recourse to many other potentially helpful means of interpretation and unduly predetermined the rules to be applied.⁹⁴ His preferred approach comprised an open-ended itemization of the various principles of interpretation, without fixed, hierarchical weightings as to the application of those principles. As a part of that approach, a wide spectrum of disciplines and methods, including ‘linguistics, logic ... mathematical and ... empirical research on the role of communicative activities in social process’, were suggested as available tools.⁹⁵

48. McDougal’s far-reaching concepts regarding the materials upon which reliance could be had to elicit the agreement of the parties was glaringly at odds with the narrower textual approach to interpretation adopted by the ILC. Of the ILC’s approach, McDougal wrote:

It can scarcely be doubted, further, that the ‘basic approach’ of the Commission in generally arrogating to one particular set of signs—the text of the document—the rôle of serving as the exclusive index of the shared expectations of the parties to an agreement is an exercise in primitive and potentially destructive formalism. The parties to any particular agreement may have thought to communicate their shared expectations of commitment by many other signs and acts of collaboration; and it is *hubris* of the highest order to assume that the presence or absence of shared subjectivities at the outcome phase of any sequence of communications, much less that of an international agreement, can be

⁹³ The hierarchy is established by the requirement that Article 31 ‘shall’ be used to interpret a treaty, whereas recourse ‘may’ be had to Article 32.

⁹⁴ See his statement of 19 April 1968 to the Committee of the Whole, reprinted at 62 *AJIL* 1021 (1968). That statement refers to Articles 27 and 28, which provisions eventually became Articles 31 and 32.

⁹⁵ McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967), at xii.

read off in simple fashion from a manifest content or ‘ordinary meaning’ of words imprinted or embossed in a document.⁹⁶

49. Professor McDougal’s views were subject to strong criticism.⁹⁷

50. Professor O’Connell, also far from convinced that the Vienna Convention properly encapsulated the rules of treaty interpretation, made the following criticism:

Articles 31-33 of the [Vienna Convention] are concerned with treaty interpretation, and they have the effect of transforming logical positions into rules of law. However, the priorities inherent in the application of these rules are not clearly indicated, and the rules themselves are in part so general that it is necessary to review traditional methods whenever interpreting a treaty. The danger in these rules is that States will argue that they are comprehensive of the canons of interpretation, whereas they are selective and themselves ambiguous. More controversy is likely to be aroused by them than allayed.⁹⁸

51. These criticisms, however, have by and large fallen into abeyance as the Vienna Convention Rules have gained increased use and have become accepted as expressing rules of customary international law.

b) FIAT Jurisprudence

52. The Vienna Convention Rules have also faced criticism in the domain of international investment law. Matthew Weiniger, for example, has observed that ‘[i]n practice the principles contained in the Vienna Convention are not wholly useful in resolving difficult questions of BIT interpretation as the guidance they provide is insufficiently concrete’.⁹⁹ He concluded from his analysis of the jurisdiction awards

⁹⁶ McDougal, ‘The ILC’s Draft Articles upon Interpretation: Textuality *Redivivus*’, 61 *AJIL* 992 (1967), at 997.

⁹⁷ See, e.g., Fitzmaurice, ‘*Vae victis* or woe to the negotiators: Your treaty or our ‘interpretation’ of it?’, 65 *AJIL* 358 (1971), at 373; Briggs, ‘The Interpretation of Agreements and World Public Order’ (Book Review), 53 *Cornell Law Review* 543 (1968), at 545; and *ASIL Proceedings* 1969, at 136.

⁹⁸ O’Connell, *International Law*, (1970), at 253 (footnote omitted).

⁹⁹ Weiniger, ‘Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT by Reading a BIT or by Reading into a BIT?’, in Mistelis and Lew, *Pervasive Problems in International Arbitration* 235 (2006), at 254. This makes one recall the observation of Professor Hart in his classic work on legal philosophy: ‘cannons [of interpretation] are themselves general rules for the use of language, and make use of general terms which themselves require interpretation’. Hart, *The Concept of Law* (1994), at 126. See also Barak, *Purposive Interpretation in Law* (2005), at 50 (‘[domestic] statutes setting laws of interpretation have little impact on the way judges actually interpret legal texts, in most cases because the guidelines are too general to be practically useful.’).

in *CMS, SGS v Pakistan*, *SGS v Philippines* and *Tokios* that tribunals were able to use interpretative principles to mould BIT provisions as they wished.¹⁰⁰ McLachlan, Shore and Weinger take a similar view when they assert that the Vienna Convention

is only of limited use in giving guidance to a tribunal in its interpretive task. Problems arise because the [Vienna Convention's] rules of construction are capable of supporting a wide range of potential interpretations. The fact that both parties to a dispute usually rely on its provisions is a good indication of its inherent flexibility ... The guidance they provide is not sufficiently concrete.¹⁰¹

53. There are incontrovertible elements of truth in the above arguments.¹⁰² To illustrate the highlighted weakness in the Vienna Convention Rules, the examination of arbitral pleadings in which the Vienna Convention Rules are invoked by the claimant and respondent is instructive. In the *Plama* case, for example, despite the application of those Rules to the same facts, the claimant and respondent reached diametrically opposite conclusions.¹⁰³ However, this is the problem associated with any rule of interpretation so far devised—total predictability of outcome will never be guaranteed.

54. Additionally, the oft-discussed FIAT awards that have made interpretations that lack consistency with other FIAT awards concerning similar BIT provisions do

¹⁰⁰ Weiniger, *ibid.*, at 254. See also van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation* (1981), at 4 (noting in relation to the interpretation of the 1948 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that the Vienna Convention Rules were helpful but adding at the same time that 'it is no secret that how they are used (some may say "manipulated") may depend on the desired result').

¹⁰¹ McLachlan, Shore and Weiniger, *International Investment Law: Substantive Principles* (2007), at 67-68, para. 3.71-3.72. Nonetheless, in another chapter of that work those authors describe in some detail the Vienna Convention Rules and even comment that Article 32(2) 'may have significant bearing on the interpretation of the treaty', and Article 31(3)(c) 'is likely to be of particular significance in the case of investment treaties.' *Ibid.*, at 221-224, paras. 7.64-7.72.

¹⁰² Adopting the words of the ICJ (in relation to general terms in treaties relating to the continental shelf), it could be said that the Vienna Convention Rules are 'terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning'. *North Sea Continental Shelf* case, ICJ Reports 3 (1969), at 30, para. 41.

¹⁰³ See, e.g., *Plama (Jurisdiction)*, at para. 188. See also the Dissenting Opinion of Alberro-Semerena in *Aguas del Tunari*, at para. 22. In *Tokios*, the object and purpose criteria was used in the majority opinion and the dissent to arrive at completely different interpretations. See *Tokios (Award)*, at para. 31 and *Tokios (Opinion)*, at para. 8.

not appear to be reflective of FIAT jurisprudence as a whole. As a recent UNCTAD study has noted:

there is evidence of almost identical disputes leading to conflicting results. Nonetheless, when ISDS experience is put into perspective, and bearing in mind that the jurisprudence is evolving on the basis of the interpretation of more than 2,500 different IIAs negotiated by different countries and containing provisions whose wording is also different, the degree of consistency in the evolving investment jurisprudence is quite remarkable.

By contrast, conflicting decisions such as those in *Lauder* and *CME* and the two SGS cases against Pakistan and Philippines have been relatively rare.¹⁰⁴

55. While to some extent it may be fair to criticise the generality of the Vienna Convention Rules, that—paradoxically—is the very characteristic that endows the Rules with one of its most valuable features: flexibility. It may be validly observed that flexibility is a vital attribute of the Rules if they are to be general rules suitable for the infinite variety of situations in which they are required to be applied. In this connection, it is noteworthy that Shabtai Rosenne considered that rules possessing a great deal of specificity would not be appropriate for the law of treaties. He noted that the Vienna Convention was drafted in a fashion that

throws the day-to-day application over to practice, including of course judicial practice, and opens the way to flexibility by endowing the statement of the law with considerable resilience and self-adaptability to constantly changing circumstances. Too detailed and too precise a codification of the law of treaties could have exactly the opposite result from that which is desired. The danger of over-specificity is that it might lead to greater international controversy and that it would therefore not reinforce international stability.¹⁰⁵

56. Criticism of the Vienna Convention Rules must also be weighed against numerous other factors. For example, due to the imperfections of language it is

¹⁰⁴ UNCTAD, ‘Investor-State Dispute Settlement and Impact on Investment and Rulemaking’, Paper by UNCTAD Secretariat (2007), UN Doc. UNCTAD/ITE/IIA/2007/3, at p. 91 (footnotes omitted). This paper notes that in relation to the investment arbitrations involving Argentina, it has been commented that ‘*l'exemple des onze décisions sur la compétence rendues dans les affaires argentine illustre parfaitement le mouvement de création d'une jurisprudence arbitrale beaucoup plus cohérente que son mode d'élaboration aurait pu le faire craindre*’, quoting E. Gaillard, ‘Chroniques des sentences arbitrales’, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI)*, Revue trimestrielle, LexisNexis, Juris Classeur, January–February–March 2006.

¹⁰⁵ Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (1970), at 52.

unlikely that words adopted in a treaty will (i) perfectly mirror the ideas, concepts or aspirations intended by the drafters or negotiators and (ii) have only one valid meaning.¹⁰⁶ It also needs to be recognised that many treaty provisions have emerged out of compromise, which may result in ‘recording disagreement in acceptable ambiguity’.¹⁰⁷ Sometimes negotiators may even consider ambiguity in a text as the only means by which to persuade an opposing State to agree.¹⁰⁸ The outcome of an interpretation may also pivot on the manner in which the legal argument is presented¹⁰⁹ and, of course, the specific factual circumstances of the case.¹¹⁰ And no matter how tightly drafted or objective a rule of interpretation might be, it would be illusory to expect a perfectly objective outcome every time that rule is applied.¹¹¹ Further, value-laden considerations may exert some influence on arbitrators where the competing arguments as to a rule’s application are finely balanced.¹¹²

¹⁰⁶ This is well reflected in the title of Lord Hoffmann’s article ‘The Intolerable Wrestle with Words and Meanings’, (1997) 114 SALJ 656. See, also, Weeramantry, *The Law in Crisis: Bridges of Understanding* (1975), at 132 (‘Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. ... Through its own particular personality each word has a penumbra of meaning which no draftsman can entirely cut away.’).

¹⁰⁷ Gardiner, *International Law* (2003), at 84.

¹⁰⁸ See, e.g., the memoirs of Dennis Ross, the United States Envoy to the Middle East (1998-2000), in his book *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (2004), at p. 395. Ambiguity in a treaty text may provide some precious room for each negotiator to persuade their domestic lawmakers, press, interest groups and general public that the treaty is in their State’s interest.

¹⁰⁹ See, e.g., *Generation Ukraine*, at para. 20.29.

¹¹⁰ One is reminded here also of the words of the *Occidental* tribunal: ‘what ultimately matters is that every solution must respond to the specific circumstances of the dispute submitted and the nature of such dispute’. *Occidental Exploration (Award)*, at para. 57. See also Starke, *Introduction to International Law* (1989), at 478 (‘These rules, canons, and principles [of interpretation], although sometimes invested with the sanctity of dogmas, are not absolute formulae, but are in every sense relative—relative to the particular text, and to the particular problem that is in question.’).

¹¹¹ Jeremy Waldron has pertinently observed that ‘[c]itizens cannot plausibly insist that judges turn themselves into machines, that they reason in exactly the same way, or that they avoid any intellectual exertions that might show up the differences in values between them.’ Waldron, ‘How Judges Should Judge’, *New York Review of Books*, 10 August 2006, p. 54, at p. 59.

¹¹² See, e.g., Dworkin, *Justice in Robes* (2006), at 32.

D. VIENNA CONVENTION RULES AS CUSTOMARY INTERNATIONAL LAW

a) International Law Practice

57. References to the Vienna Convention Rules as generally applicable interpretation rules were emerging even before the Vienna Convention entered into force in 1980. In the European Court of Human Rights 1975 judgment in the *Golder* case, for example, it was observed that ‘Articles 31 to 33 [of the Vienna Convention] enunciate in essence generally accepted principles of international law’.¹¹³

58. One of the first authoritative signs that the Vienna Convention Rules had transformed into rules of customary law is found in Ian Sinclair’s 1984 publication on the Vienna Convention, in which he wrote that ‘[t]here is no doubt that Articles 31 to 33 of the [Vienna Convention] constitute a general expression of the principles of customary international law relating to treaty interpretation’.¹¹⁴

59. The first suggestion by the ICJ that Articles 31 to 33 encapsulated customary international law appeared in its 1991 judgment in the *Case concerning the Arbitral Award of 31 July 1989*. There, the Court held—in a relatively guarded statement—that Articles 31 and 32 ‘may in many respects be considered as a codification of existing international law on the point’.¹¹⁵ There have since been several bolder ICJ

¹¹³ 57 *ILR* 201 at 214, para. 29.

¹¹⁴ Sinclair, *supra* note 6, at 153.

¹¹⁵ ICJ Reports 53 (1991), at 69-70, para. 48. In the *Iron Rhine* (*Ijzeren Rijn*) *Railway Arbitration* (Belgium v Netherlands), 24 May 2005, available at <www.pca-cpa.org>, at para. 45, the Tribunal observed—after citing several instances in which the ICJ applied the rules of customary international law as formulated in Articles 31 and 32—that ‘[t]here is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act’. For some early references to Article 31 in ICJ separate or dissenting opinions, see Judge Ammoun, Separate Opinion in the *Barcelona Traction* case, ICJ Reports (1970), at 304; Judge Dillard, Separate Opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council*, ICJ Reports (1972), at 107; Judge de Castro, Separate Opinion in the *Fisheries Jurisdiction (Fed. Rep. Germ. v Iceland)* case, ICJ Reports (1974), at 226; Judge de Castro, Dissenting Opinion in the *Aegean Sea Continental Shelf* case, ICJ Reports (1978), at 68, 69; and Judge Mosler, Separate Opinion, *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility, ICJ Reports 392 (1984), at 463. See generally Torres Bernárdez, ‘Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties’, in Hafner *et al.* (eds.),

pronouncements confirming the customary status of those Articles.¹¹⁶ In addition to the ICJ judgments, an enormous body of other international law jurisprudence,¹¹⁷ as well as domestic court pronouncements from across the globe,¹¹⁸ now provide

Liber Amicorum for Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday (1998), at 721-748.

¹¹⁶ See *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), Judgment, ICJ Reports (1992), at 582-583, para. 373, and 586, para. 380; *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad), Judgment, ICJ Reports (1994), at 21-22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, ICJ Reports (1995), at 18, para. 33; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 66 (1996), 75, para. 19; *Oil Platforms* case (Iran v. US), Preliminary Objection, ICJ Reports 803 (1996), at 812, para. 23; *Kasikili/Sedudu Island* (Botswana v. Namibia), ICJ Reports 1045 (1999), at 1059, para. 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), ICJ Reports (2002), at para. 37; *LaGrand* (Germany v. US), ICJ Reports 466 (2001), at 501, para. 99; *Oil Platforms* case (Iran v. US), Judgment, ICJ Reports 161 (2003), at 182, para. 41; *Avena and Other Mexican Nationals* (Mexico v. United States), ICJ Reports 12 (2004), at 48, para. 83; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 136 (2004), at 174, para. 94. No statement as to the customary status of Article 33 has yet been made by the ICJ. As to the customary international law status of Articles 31-33 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (these are identical to Articles 31 to 33 of the Vienna Convention), see the *UNESCO-France Arbitration* (Award of 14 January 2003), reprinted in 107 *Revue Général de Droit International Public* 221 (2003), at 236, para. 41; noted in 98 *AJIL* 163 (2004).

¹¹⁷ See, e.g., the *Golder* case, ECHR, 21 February 1975, 57 ILR 201 at 213-214, para. 29; *Beagle Channel Arbitration*, (Argentina v. Chile) (1977) 52 ILR 93, at 127, para. 15; *Kingdom of Belgium v. Federal Republic of Germany (Young Loan Arbitration)*, (1980) 59 ILR 495 at p. 529, para. 16; *Restrictions to the Death Penalty*, IACHR, (1983) 70 ILR 449, at 465, paras. 47ff.; *Standards for Reformulated and Conventional Gasoline*, Report of the WTO Appellate Body, 29 April 1996; the *Volga* case, ITLOS (2002), at para. 77; the *Juno* case, ITLOS (2004), at para. 51; and *Iron Rhine ('Ijzeren Rijn') Railway Arbitration* (Belgium v. Netherlands), 24 May 2005, available at <www.pca-cpa.org>, at para. 45; *Prosecutor v. Tadić*, ICTY Decision (1995) on the Prosecutor's motion to withdraw protective measures for victims and witnesses, at para. 18; *Prosecutor v. Delalić*, ICTY Judgment (1998), at para. 1161; *Decision regarding Delimitation of the Border* (Eritrea v. Ethiopia), Eritrea-Ethiopia Boundary Commission, 41 ILM 1057 (2002), at para. 3.4. It is also noteworthy that during the ratification process of the Vienna Convention in the United Kingdom, the Attorney-General stated that Articles 31(1) and (3) of the Vienna Convention were 'a statement of the relevant rules under customary international law', *Parliamentary Debates (Commons)*, vol. 812, col. 1768 (3 March 1971). See also, Elias, *Modern Law of Treaties* (1974), at 13; Lauterpacht and Bethlehem, "The Scope and Content of the Principle of *non-refoulement*: Opinion", in Feller, Türk and Volker, (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 103; Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties* (2005), at 221; and Dixon, Khan and Fulford (eds.), *Archbold International Criminal Courts: Practice Procedure and Evidence* (2005), at 155, *et seq.*

¹¹⁸ See, e.g., *Fothergill v. Monarch Airlines Ltd* [1981] AC 251 at 282; *Ecuador v. Occidental Exploration & Production Co* (No. 2), [2006] EWHC 345 (Comm), at para. 90; *Czech Republic v. European Media Ventures SA*, [2007] EWHC 2851 (Comm), at para. 14; the Svea Court of Appeal (Sweden) in *Czech Republic v. CME Czech Republic BV*, at p. 93 of English translation ('General principles regarding interpretation of treaties under international law are found in the 1969 Vienna Convention on the Law of Treaties'); *The Commonwealth v. Tasmania (the Tasmanian Dams Case)* (1983) 158 CLR 1 at 222; *Thiel v. Federal Commissioner of Taxation* (1990) 171 CLR 338, at 349, 356; *Victrawl Pty Ltd v. Telstra Corporation Ltd*, (1995) 183 CLR 595 (H. Ct. of Aust.) at 622; and

incontrovertible support for the proposition that Articles 31 to 33 reflect customary rules of international law.

60. Because the Vienna Convention Rules reflect customary international law, they also bind States that are not parties to that Convention. This aspect of customary law was illustrated in *Sovereignty over Pulau Ligitan and Pulau Sipadan*, in which Indonesia, although not a party to the Vienna Convention, did not dispute before the ICJ that the Vienna Convention Rules constituted the applicable rules.¹¹⁹

b) FIAT Practice

61. As far back as 1979, scholarly literature relating to international investment law recognized the significance of the Vienna Convention Rules. In that year, C.F. Amerasinghe, in commenting on the principles of interpretation applicable to the ICSID Convention's jurisdictional clauses, wrote:

[i]t is arguable that there are several choices open in the task of interpreting a convention. But generally it is admitted, and seems to have been the consensus underlying the Vienna Convention, that the most frequent approach as reflected in Article 31 of the Vienna Convention requires that the terms of a treaty be given their ordinary meaning in context and in the light of the object and purpose of the treaty.¹²⁰

62. In comparison, FIAT awards were relatively slow to refer explicitly to the Vienna Convention Rules. An early exception was the *AAP* award's reference to the Rules. Rendered in 1990, that was the first FIAT award issued under the auspices of

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (H. Ct. of Aust.), at 277; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, Sup. Ct. of Canada, (1998) 160 DLR (4th) 193, at 221; *Thomson v Thomson*, Sup. Ct. of Canada, (1995) 119 DLR (4th) 253, at 272; *R v Parisien*, Sup. Ct. of Canada, [1988] 1 SCR 950, at 958. As regards domestic case law of the United States, see, e.g., *Chubb & Son, Inc. v Asiana Airlines*, 214 F.3d 301 (2nd Cir. 2000), at 308-12, and generally, Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts', 28 *Virginia Journal of International Law* 281 (1987/1988). The American Law Institute's *Restatement of the Foreign Relations Law of the United States, Third Restatement* at §325(1) replicates Articles 31(1) and (3), at §325(2), with some inconsequential differences. The codification found in the Restatement omits other provisions of Articles 31 to 33. Nonetheless, most of those omitted provisions are still covered in the Restatement by way of inclusion in the American Law Institute's Commentary to §325.

¹¹⁹ (*Indonesia v. Malaysia*), ICJ Reports (2002), at para. 37.

¹²⁰ Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 167.

ICSID. In it, the tribunal referred to Article 31 of the Vienna Convention but at the same time formulated its own rules, which largely reflected the pre-Vienna Convention Rules position on treaty interpretation.¹²¹

63. In more recent cases, numerous FIAT awards have considered the Vienna Convention Rules sufficiently important to quote¹²² or paraphrase.¹²³ Many others cite merely the relevant Article or paragraph, without quote or description of their content.¹²⁴

¹²¹ *APP (Award)*, at paras. 38–42. A detailed discussion of this award is found in Chapter VI, Section A.

¹²² See, e.g., *Yukos (Interim Award)*, at para. 261 (Articles 31 and 32); *Hrvatska*, at paras. 158 and 160 (Articles 31 and 32); *Canadian Cattlemen*, at para. 33 (Articles 31 and 32); *Tza Yap Shum*, at para. 38 (Articles 31 and 32); *Malaysian Historical Salvors (Annulment)*, at para. 53 (Articles 31 and 32); *MTD (Award)*, at para. 112 (Article 31(1)); *Petrobart (Award)*, p. 23 (Article 31(1)); *Canfor (Jurisdiction)*, at para. 177, n. 185 (Articles 31 and 32); *Banro*, at para. 19 (Article 31); *Camuzzi*, at para. 133 (Article 31); *Sempra Energy (Jurisdiction)*, at para. 141 (Article 31(1)); *Plama (Jurisdiction)*, at paras. 26 (Articles 31 and 32); *Aguas del Tunari*, at paras. 90 and 92 (Articles 31 and 32); *Enron (Ancillary Claim)*, at para. 32 (Articles 31(1) and 32); *Methanex (Partial Award)*, at para. 97 (Article 31(1)); *Methanex (Final Award)*, at Part II, Chpt. B, paras. 15 and 18 (Article 31, subparagraphs (1) and (3), and Article 32); *Pope & Talbot (Interim Award)*, para. 67 (quoting all subparagraphs of Article 31 and paraphrasing Article 32); *Pope & Talbot (Merits, Phase 2)*, para. 75, n. 68 (quoting Article 31(1) and referring to paras. 31(3) and 32, at para. 115, n. 114 and 117); *Pope & Talbot (Damages)*, para. 26, n. 10 (Article 32); *SD Myers (Partial Award)*, para. 201 (Articles 31(1) and (2)); *Siemens (Jurisdiction)*, para. 80 (Article 31(1)); *Eureko*, at para. 247 (Article 31(1)); *Waste Management*, 5 ICSID Reports, 451, para. 9 (Article 31(1)) and that Award's Dissenting Opinion by Keith Highet at para. 5, n. 2 (Article 31(1)) and para. 64, n. 54 (Article 31(2)(b)), *Tokios (Jurisdiction)*, at para. 27 (Article 31(1)), and Weil's Dissenting Opinion, at para. 19 (Article 31(1)); *Ethyl (Jurisdiction)*, at para. 51 (Articles 31 and 32); *CME v Czech Republic (Final Award)*, Professor Brownlie's Separate Opinion, at para. 15 (Articles 31 and 32). It may be observed from this list that there is a general tendency for NAFTA tribunals to quote the rules more than other FIATs.

¹²³ See, e.g., *CDC (Annulment)*, at para. 33 (Article 31); *Lucchetti (Annulment)*, at para. 79; *Noble Ventures (Award)*, at para. 50 (Articles 31 and 32); *Metalclad (Award)*, at 225, para. 70 (Article 31(1), 31(2)(a) and 31(3)); *Champion Trading (Jurisdiction)*, 19 ICSID Review, at p. 288 (Article 31); *Loewen (Jurisdiction)*, at para. 51 (Articles 31(1) and (2)); *SGS v Pakistan*, at para. 164 (paraphrasing Article 31(1) without making express reference to the Vienna Convention). In *Amco (Resubmitted Jurisdiction)*, at 550, the tribunal endorsed an interpretation of Article 52 contained in a legal opinion of Professor Reisman submitted by Indonesia in which he stated that his conclusions were 'mandated by the ordinary meaning, objects, and purposes of the text and the context of ICSID Article 52', which was a clear reference to Article 31(1) of the Vienna Convention.

¹²⁴ See, e.g., *CSOB (Jurisdiction)*, at para. 57 (Article 31(1)); *Tecmed*, at paras. 121 and 155 (Article 31(1)); *SGS v Philippines*, at para. 99, n. 32; *Salini v Jordan (Jurisdiction)*, at para. 75 (Articles 31 to 33); *Salini v Jordan (Award)*, para. 75; *CME (Final Award)*, para. 496 (Article 31); *CAA-Vivendi (Challenge)*, para. 12 (Article 31(3)); *El Paso*, at para. 68 (quoting *Methanex (Partial Award)*, para. 68, which referred to Article 31(1)); *ADF (Award)*, at para. 148, n. 153 (Articles 31 and 32); *Lauder*, para. 292 (Articles 31 and 32); *ADC*, para. 290; *Maffezini*, Jurisdiction at 400–403, paras. 27 (Article 31);

64. In an empirical study of 98 decisions made by ICSID tribunals during 1 January 1998 and 31 December 2006 (the ‘Fauchald empirical analysis’),¹²⁵ references to Articles 31-33 of the Vienna Convention were found in 35 decisions. This number represented only 36 percent of the ICSID decisions reviewed in that study. However, no indication is contained in the study as to whether it took into account decisions in which the Vienna Convention Rules were paraphrased, applied without explicit reference to them or even whether the decision required a treaty to be interpreted. Nonetheless, the figures are indicative of a significant number of cases that do not refer to the Vienna Convention Rules.¹²⁶ Moreover, that analysis found further that

[i]f we look beyond the mere references to the [Vienna Convention] ... and assess whether the tribunals actually made active use of the instruments in their reasoning, we can find elements of such application of Articles 31-33 of the [Vienna Convention] in 20 [out of 98] decisions. The application of the [Vienna Convention Rules and Article 38 of the ICJ Statute] was in general very brief and they were used only as general arguments in support of the tribunals’ approaches in almost all decisions. Only in exceptional decisions did tribunals integrate the [Vienna Convention] into their reasoning beyond general references or make any link between the [Vienna Convention] and case law of the ICJ.¹²⁷

AAP, at para. 38 (Article 31); *Fedax v Venezuela*, at para. 20 (concurring with Venezuela ‘about the need to apply rules of interpretation laid down in the Vienna Convention’); *Mondev*, at para. 43 (Articles 31 to 33); *Occidental Exploration (Award)*, at para. 68 (referring to the Vienna Convention Rules in a general manner).

¹²⁵ Fauchald, *supra* note 11.

¹²⁶ In the research undertaken for the present thesis, the FIAT awards found not to refer explicitly to the Vienna Convention Rules in their decisions concerning the interpretation of treaties included *Amco (Annulment)*, at para. 18; *Vivendi (Award)*; *Vivendi (Annulment)*; *LESI*; *Feldman (Award)*; *Wena Hotels (Annulment)*; *Azurix (Jurisdiction)*; *CME (Partial Award)* (despite the Respondent’s submission that the relevant treaty was to be interpreted ‘according to the ordinary rules of treaty interpretation as established by State practice and as codified in Article 31 of the [Vienna Convention]’, at para. 284); in addition, in the challenge to this award before the Svea Court of Appeal (Sweden) in *Czech Republic v CME Czech Republic BV*, at p. 93 of English translation, found need to refer to Article 31(1) and 31(3)(c) of the Vienna Convention); *Gruslin v Malaysia*; *Feldman (Jurisdiction)*; *Joy Mining*; *LG&E*; *Impregilo*; *Genin v Estonia*; *Methanex (Amicus Decision)*; *Middle East Cement* (although this was quite a straightforward application of the BIT at issue); *Mihaly*; *Lanco* (no mention of the rules in interpreting Article 26 of the ICSID Convention at 381-3, paras. 35 to 40; this was despite its reference to Article 24(1) of the Vienna Convention, at 378, para. 27); and *Cable Television*, at 121, para. 2.28 *et seq.* (interpreting Article 25 of the ICSID Convention).

¹²⁷ Fauchald, *supra* note 11, at 314 (footnotes omitted).

65. The above figures do not appear to be consistent with Professor Schreuer's position that '[t]ribunals almost invariably start by invoking Article 31 of the [Vienna Convention] when interpreting treaties.'¹²⁸

66. As mentioned in the previous paragraphs, the present thesis research found more recent decisions tended to make more reference to the Vienna Convention Rules. The Fauchald empirical analysis reveals an interesting trend in this respect: the frequency of the references increased toward the latter part of the period examined. For the years 1999-2002, references to those provisions were made in 21 percent of the decisions whereas in the period 2003-2006, references were made in 47 percent of the decisions.¹²⁹ In other words, an increase of over 120 percent took place respect of references to the Vienna Convention Rules in the second period.

67. Moreover, a considerable weight of FIAT authority confirms that the Vienna Convention Rules reflect customary international law. Many cases have explicitly held that the Vienna Convention Rules on interpretation reflect, express, comprise or codify customary international law.¹³⁰ Other FIATs, while not explicitly stating that the Vienna Convention Rules embody customary international law rules, have variously described those Rules, or at least Article 31(1), as

a) 'normal principles of treaty interpretation';¹³¹

b) the 'principal international law rules on the interpretation of treaties';¹³²

¹²⁸ Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3(2) *Transnational Dispute Management* (2006), at 1.

¹²⁹ Fauchald, *supra* note 11, at 314.

¹³⁰ See, e.g., *Phoenix*, at para. 76; *Canadian Cattlemen*, at para. 46 (Articles 31 and 32); *Agua del Tunari*, at para. 88; *Noble Ventures (Award)*, at paras. 50 and 55 (Articles '31 et seq. '); *Canfor (Jurisdiction)*, at para. 177; *Mondev*, at 203, para. 43 (Articles 31 to 33); *Salini v Jordan (Jurisdiction)*, at para. 75 (Articles 31 to 33); *Banro*, at para. 19 (Article 31); *Methanex (Partial Award)*, at para. 97, (Article 31(1)); *Methanex (Final Award)* Part IV, Chpt. B, at para. 29 (Articles 31 and 32); *Camuzzi*, at para. 133. See also *Eureko*, at para. 247. See also *Tokios (Jurisdiction)*, at para. 27 which refers to Article 31 of the Vienna Convention and at the same time says that 'much' of the Vienna Convention reflects customary international law, not specifying whether Article 31 is reflective of such custom.

¹³¹ *SGS v Philippines*, at para. 99 (Articles 31 to 33).

- c) the ‘principal means of interpretation’;¹³³
- d) ‘general principles of treaty interpretation’;¹³⁴
- a) the ‘legal principles applicable to treaty interpretation’;¹³⁵
- b) the ‘primary guide’ to the interpretation of the NAFTA;¹³⁶
- c) ‘the sound universally accepted rules of treaty interpretation’;¹³⁷
- d) the ‘rules governing the interpretation of treaties’;¹³⁸
- e) rules ‘now universally accepted as general international law’;¹³⁹
- f) the ‘first port of call’ for treaty interpretation;¹⁴⁰
- g) the ‘norms of interpretation’;¹⁴¹ and
- h) rules ‘declaratory of existing law’.¹⁴²

68. The customary international law expressed in the Vienna Convention Rules also has been applied in FIAT cases in which the respondent State was not a party to the Vienna Convention. This aspect of FIAT practice is well illustrated in *Aguas del Tunari*. In that case, the Netherlands-Bolivia BIT was the treaty under which the investment claim was made. The Netherlands was a party to the Vienna Convention

¹³² *Pope & Talbot (Interim Award)*, at para. 65 (no specific identification of a Vienna Convention Article).

¹³³ *Sempra Energy (Jurisdiction)*, at para. 142.

¹³⁴ *Petrobart (Award)*, p. 23.

¹³⁵ *Continental Casualty (Award)*, at para. 187.

¹³⁶ *Loewen (Jurisdiction)*, at para. 51.

¹³⁷ *AAP*, at para. 38.

¹³⁸ *Enron (Jurisdiction)*, at para. 47.

¹³⁹ Dissenting Opinion of Keith Highet in *Waste Management*, at 463, para. 5, n. 2.

¹⁴⁰ *SD Myers (Partial Award)*, at para. 201.

¹⁴¹ *MTD (Award)*, at para. 112.

¹⁴² *Ethyl (Jurisdiction)*, at para. 52, citing De Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 42 (1978-I) (‘Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law’).

whereas Bolivia, the respondent State, was not. As a consequence, the Vienna Convention was held not to be applicable in the case but the tribunal held that because the Convention's rules relating to treaty interpretation reflect customary international law, it constituted the applicable law for the interpretation of the BIT between those two States.¹⁴³

69. In relation to this issue, it is noteworthy that the United States has not signed the Vienna Convention and was in fact one of the principal critics of the Vienna Convention Rules at the Vienna Conference.¹⁴⁴ Despite this initial opposition, the United States attitude has undergone a sea change over the years. In *Methanex*, for instance, the United States agreed that Article 31(1) reflected customary international law.¹⁴⁵

70. Notwithstanding the vast body of FIAT jurisprudence applying the Vienna Convention Rules as detailed above, a number of FIAT awards have failed to make any direct reference to those Rules when called upon to interpret a treaty. For example, in *Amco (Annulment)* case, reference to the rules of treaty interpretation were made in the following general form, without any reference to the Vienna Convention Rules: 'Problems of interpretation or *lacunae* which emerge have to be

¹⁴³ *Aguas del Tunari*, at para. 88. Similarly, see *Canfor (Jurisdiction)*, at para. 177 (indicating that the Vienna Convention rules of interpretation apply to the United States even though it has failed to ratify that treaty).

¹⁴⁴ In his Dissenting Opinion in *Qatar v Bahrain*, Judge Schwebel observed that '[t]he Vienna Convention on the Law of Treaties is accepted by this Court as an authoritative codification of international law. Its provisions on interpretation of treaties however were particularly contested, to some extent in the International Law Commission which composed them, and much more acutely in the United Nations Conference on the Law of Treaties itself. Nevertheless they were adopted by large majorities.' *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1995 p. 6, at p. 28.

¹⁴⁵ *Methanex (Partial Award)*, at para. 97. See also *Ethyl (Jurisdiction)*, at para. 52 in which it was observed that the United States accepted the Vienna Convention as a correct statement of customary international law, citing *Iran v United States ('Decision A18')* Iran-US Claims Tribunal, Decision 32-A18-FT (6 April 1984), 5 Iran-US CTR 251 (1984), at 259, and also citing a number of United States domestic court decisions that have looked to the Vienna Convention when interpreting treaties. See also the almost verbatim formulations of Articles 31 and 32 of the Vienna Convention in Article 21.9(2) of the United States – Australia Free Trade Agreement, 18 May 2004, text at www.ustr.gov/new/fta/Australia/final/final.pdf.

solved or filled in accordance with the principles and rules of treaty interpretation generally recognized in international law'.¹⁴⁶

71. It should also be noted here that while the Vienna Convention Rules contain or allow application of most of the generally accepted rules of treaty interpretation, they do not explicitly refer to all of the prominent rules, particularly the principle of effectiveness. This is perhaps why the *ad hoc* Committee in *Lucchetti* stated that the general principles of international law on treaty interpretation were 'set out *primarily* in the [Vienna Convention].'¹⁴⁷ But such a qualification is rarely found in FIAT awards.

72. By way of mutual agreement an investor and a host State may agree to dispense with the Vienna Convention Rules and use other interpretative techniques, for example, requiring that the meaning of treaty provisions be determined and applied *ex aequo et bono*. While there is specific mention to this method of dispute resolution in Article 42(3) of the ICSID Convention, no award reviewed for this thesis has adopted this approach.¹⁴⁸

¹⁴⁶ *Amco (Annulment)*, at para. 18. See also *Tecmed*, at para. 55, where the tribunal referred to the 'rules governing the interpretation of treaties' without referring to the Vienna Convention but later at para. 155 it makes express reference to Article 31(1) (albeit without applying each one of its criteria).

¹⁴⁷ *Lucchetti (Annulment)*, at para. 79 (emphasis added).

¹⁴⁸ See also Fauchald, *supra* note 11, at 305.

E. INTERPRETATION AND APPLICATION DISTINGUISHED

73. The subject matter of the present thesis calls for a brief exposition on the distinction between two closely connected treaty processes: interpretation and application. The former concerns ascertaining a treaty provision's precise meaning. The latter involves applying a treaty term to a concrete set of factual circumstances.¹⁴⁹

74. Theoretically, interpretation constitutes the step before application—one cannot apply a law unless its precise meaning is known. In practice, however, the line demarcating the interpretation of treaty terms and their application may sometimes be far from clear. In many cases, an interpretation may depend on an examination of how a given interpretation will apply to the facts. In other cases, simple logic or common sense will dictate that the treaty provisions automatically apply to the facts without real need for a separate 'application' of the treaty once a meaning of a provision is determined (through a process of interpretation). Given this close relation between the two concepts, it has been asserted that '[a]ny time an issue involving the application [of a treaty] arises, the interpretation of its provisions becomes indispensable'.¹⁵⁰

75. As a consequence of this interplay, the thesis may examine areas considered by some to be an application of a treaty. It should be added here that FIATs more punctilious in the presentation of their reasons attempt—rather helpfully—to deal with these two procedures in separate sections of the award.¹⁵¹

¹⁴⁹ See generally, Gardiner, *Treaty Interpretation* (2008), at 26-29. See also Sir Franklin Berman's Dissenting Opinion in *Lucchetti (Annulment)*, at para. 15, which emphasises the twofold need to interpret a treaty and then apply it.

¹⁵⁰ Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts', 28 *Virginia Journal of International Law* 281 (1987/1988), at 327. Professor Hart took the view that 'the range of application of a law is always a question of its interpretation'. Hart, *supra* note 99, at 42.

¹⁵¹ See, e.g., *Mondev*, at para. 93 *et seq.*; *Methanex (Partial Award)*, Chapters J and K; and Professor Brownlie's Separate Opinion in *CME (Final Award)*, at paras. 17 *et seq.* and 34 *et seq.* (classifying sections of his opinion into 'Treaty Criteria' and 'Application of the Treaty Criteria').

F. WHO MAY INTERPRET TREATIES?

76. Articles 31 to 33 of the Vienna Convention remain silent as to the persons or bodies that are permitted to interpret treaties. The Harvard Research identified a wide spectrum of potential interpreters when it stated that

in so far as treaties in their international aspect are concerned, they may be authoritatively interpreted by the parties themselves through mutual agreement, either directly and through the ordinary channels of international relations, or indirectly as the result of recourse to good offices, mediation, or conciliation. Or they may be interpreted by an international organ or agency, permanent or *ad hoc*, to whose decision and interpretation the parties to the dispute agree to submit.¹⁵²

77. Also indicated in the Harvard Research was that State parties to a treaty have the right to issue an authoritative interpretation of their treaty if unanimous agreement among them is obtained. This is reflected in Articles 31(2) and (3) of the Vienna Convention.¹⁵³

78. However, a State cannot make a binding interpretation of a treaty to which it is a signatory unilaterally. As the tribunal held in the *Plama* case, a State having power to interpret a treaty unilaterally in the context of an investor-State dispute would be akin to a State being a ‘judge in its own cause’.¹⁵⁴ Based on similar reasoning, it was held in *Impregilo* that the scope of a BIT cannot be altered solely by the domestic law of one of the State parties to that BIT.¹⁵⁵

79. In *Camuzzi*, Argentina contended that the interpretation of a treaty

¹⁵² Harvard Research on International Law, reprinted in 29 *AJIL (Supplement)* 657 (1935), at 975-76.

¹⁵³ See also, e.g., Article 30(3) of the 2004 US Model BIT (‘[a] joint decision of the Parties ... declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint declaration’).

¹⁵⁴ *Plama (Jurisdiction)*, at para. 149.

¹⁵⁵ *Impregilo*, at para. 150.

must be based on the intention of the parties and that States signatories to the treaty are the best qualified to do so. In that view, interpretation is not the task of arbitral tribunals and the case law to this effect should be ignored.¹⁵⁶

80. The tribunal did not agree:

Notwithstanding the Argentine Republic's opinion to the contrary, interpretation is not the exclusive task of States. It is also the duty of tribunals called to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions as a source of international law in Article 38(1) of the Statute of the International Court of Justice, to which the Respondent refers.¹⁵⁷

81. The implicit concern of the *Camuzzi* tribunal appears to be that that once an investor-State treaty dispute has arisen, it would be unfair thereafter to allow the State parties to that treaty to interpret its terms in order to evade jurisdiction or liability in relation to a claim by an investor.¹⁵⁸ However, a balance needs to be struck with the legitimate entitlement of the signatories to clarify BITs by subsequent agreement as is provided for in Article 31(3) of the Vienna Convention.¹⁵⁹

¹⁵⁶ *Camuzzi*, at para. 124. The quote is the tribunal's description of Argentina's argument.

¹⁵⁷ *Camuzzi*, at para. 135. See also the *Camuzzi* companion award, *Sempre Energy (Jurisdiction)*, at para. 147; and *Aguas del Tunari*, at para. 263 ('it is the Tribunal, and not the contracting parties, that is the arbiter of its jurisdiction'). Concerning the *Camuzzi* statement that judicial decisions constitute sources of law, see *infra* note 568. In *Methanex*, the three NAFTA States made concurring submissions regarding the meaning of Article 1101(1) of that treaty. It was contended by those States that this common consensus amounted to a subsequent agreement under Article 31(3) of the Vienna Convention, which constituted an authoritative interpretation that the tribunal should follow. See *Methanex (Partial Award)*, at para. 130 (United States position); para. 133 (Canadian position); and para. 134 (Mexican position). Because the tribunal decided in favour of the interpretation asserted by the States (based on the criteria set out in Article 31(1)) it considered it unnecessary to explore the Article 31(3) argument. *Methanex (Partial Award)*, at para. 147.

¹⁵⁸ Similar concerns appear to have surfaced in NAFTA cases relating to the interpretation of Article 1105 of the NAFTA by the FTC. E.g., the *Pope & Talbot* tribunal took the view that it would not simply accept whatever the FTC stated to be an interpretation. *Pope & Talbot (Damages)*, at para. 23. Compare *ADF (Award)*, at paras. 176-7.

¹⁵⁹ The *CME* and *Lauder* arbitrations, for example, appear to have led to the conclusion of 'Agreed Minutes' between the Netherlands and the Czech Republic as to a common position in respect of the applicable interpretation of Article 8.6 of the Agreement on Encouragement and Reciprocal of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991. See the Svea Court of Appeal Judgment (Sweden), *Czech Republic v CME Czech Republic BV*, at pp. 6-7; and *CME (Final Award)*, paras. 89 *et seq.* However, even though this common position was established there appeared to be argument as to what that position actually meant. See *CME (Final Award)*, paras. 398 *et seq.*

82. Treaties may allocate the task of interpretation to bodies or persons other than courts or arbitral tribunals. The NAFTA, for instance, established (in addition to the NAFTA Chapter 11 arbitration process) the FTC, which was empowered to resolve on its own initiative disputes that may arise regarding the interpretation or application of that treaty. Such an interpretation is deemed to be binding on a NAFTA tribunal.¹⁶⁰ Additionally, pursuant to Article 1131(1), a NAFTA tribunal may be obliged to request certain interpretations from the FTC.¹⁶¹ More recently, pursuant to Article 155 of the New Zealand-China FTA, an arbitral tribunal formed under that treaty must, upon the request of a State party, request a joint interpretation from the State parties in respect of issue in dispute. This interpretation will be binding on the tribunal.

83. Domestic courts may have jurisdiction to interpret BITs but, as it was indicated in *Maffezini*, BIT dispute resolution provisions may allow such domestic interpretations to be ultimately determined by a FIAT.¹⁶² In respect of private parties, it has been held that between themselves (and without the consent of a State) they cannot by their own interpretation of an investment treaty expand the rights created by that treaty.¹⁶³

¹⁶⁰ See, NAFTA Articles 1131(2) and 2001(2).

¹⁶¹ NAFTA Article 1132(1) prescribes:

Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the [FTC] on the issue. ...

Similar wording is used in Article 31 of the 2004 US Model BIT. By virtue of this provision, the tribunal is obliged, upon request by the respondent State, to seek an interpretation from the parties to the BIT as to the meaning of certain annexes. Paragraph 2 of Article 31 states that the interpretation is binding on the tribunal.

¹⁶² *Maffezini*, at para. 31 (rejecting the respondent's argument that the applicable BIT referred the dispute to international arbitration only if there occurred a denial of justice by a domestic court and observing that dispute resolution clauses 'are designed to give foreign investors the right to have their disputes under a BIT decided either exclusively or ultimately by international arbitration').

¹⁶³ *Impregilo*, at para. 136.

84. Attention should also be drawn to the Report of the Executive Directors, which discuss the meaning of certain provisions of the ICSID Convention.¹⁶⁴ Although the Executive Directors could be seen as representatives of the sponsor of the treaty, i.e., the International Bank for Reconstruction and Development (now known as the World Bank),¹⁶⁵ their elaborations are more likely to be viewed as guides to the interpretation of the ICSID Convention rather than any binding determination as to its meaning.

85. Finally, Article 64 of the ICSID Convention should be noted for its grant of jurisdiction to the ICJ to interpret that Convention in the event that State parties disagree on the meaning of its provisions. That Article provides:

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

86. No case has yet been filed with the ICJ pursuant to this provision.

G. WHAT MAY BE INTERPRETED?

87. It is almost pointless to state that the Vienna Convention Rules apply to treaties.¹⁶⁶ But complexity may surface in the application of those Rules when there is uncertainty as to what constitutes a treaty. Treaties are defined in Article 2(1)(a) of the Vienna Convention as follows:

“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ...

¹⁶⁴ See, e.g., Report of the Executive Directors, at para. 22.

¹⁶⁵ See *History of the ICSID Convention*, Vol. II, Part 2, p. 1087.

¹⁶⁶ Interestingly, the Chairman’s Statement at the Adoption Session of the Energy Charter Treaty, 17 December 1994, explicitly stated that that Treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.’ See Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (Brussels 2005), at p. 157.

88. In other words, agreements between States and investors, such as concession contracts or contracts for the supply of goods are not covered by the Vienna Convention Rules.¹⁶⁷

89. In some instances, however, rules of treaty interpretation have been applied to a range of instruments not strictly within the confines of the Vienna Convention definition, for example, to interpret the UNCITRAL Arbitration Rules¹⁶⁸ or domestic laws that provide a State's consent to investment treaty arbitration.¹⁶⁹

¹⁶⁷ See, e.g., Peter, *Arbitration and Renegotiation of International Arbitration Agreements* (1986), at 100.

¹⁶⁸ See *Methanex (Partial Award)*, at para. 100. Aust, *supra* note 4, at 39, suggests that treaty interpretation rules may be 'convenient and reasonable' to apply to memoranda of understanding 'in so far as they are not at variance with the non-legally binding nature of MOUs'.

¹⁶⁹ See Chapter VI, Section C. In relation to the interpretation of investor-State agreements on consent to ICSID arbitration, see generally Schreuer, 'The Interpretation of ICSID Arbitration Agreements', in Wellens (ed.), *International Law: Theory and Practice; Essays in Honour of Eric Suy* (1998), at 719. See also Waelde and Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation', 31 *Texas International Law Journal* 215 (1996), at 250 *et seq.*

Chapter III

THE GENERAL RULE OF TREATY INTERPRETATION

Chapter outline: This Chapter studies in detail each provision of the 'general rule' of interpretation contained in Article 31 of the Vienna Convention. Following a general introduction in Section A, Section B proceeds to examine treaty interpretation practice relating to good faith, ordinary meaning, context and object and purpose—the four main criteria contained in the all important first paragraph of Article 31. Section C deals with Article 31(2), which provides an elaboration of 'context' in treaty interpretation. Section D is concerned with the role of a subsequent agreement or practice and relevant rules of international law in interpreting a treaty pursuant to Article 31(3). Finally, Section E discusses the reference in Article 31(4) to special meanings given by parties to a treaty term. Also relevant to this Chapter are Annexes I and II of the thesis, which provide a guide to the drafting history of Article 31.

A. INTRODUCTION

90. Article 31 of the Vienna Convention contains four paragraphs. The ILC intended them to be read together as one 'general rule'. Accordingly, all the paragraphs of Article 31 are positioned under one heading entitled 'General rule of interpretation'.¹⁷⁰ This title was expressed in the singular, not in the plural (i.e.,

¹⁷⁰ Article 31 was numbered as Article 27 in the ILC's final 1966 draft.

‘General rules’) because the ILC sought to emphasize that all four paragraphs of the article formed a single, closely integrated rule.¹⁷¹

91. A strict application of this general rule, i.e., all paragraphs of Article 31, would therefore require (A) a good faith interpretation according to (i) the ordinary meaning of the treaty terms (ii) in their context and (iii) in the light of the treaty’s object and purpose; (B) giving consideration, where applicable, to (i) the preamble, (ii) annexes, and (iii) agreements or instruments connected with the treaty’s conclusion; (C) taking into account (i) certain post-treaty agreements or practice relating to the treaty’s interpretation or application, and (ii) any relevant rules of international law; and (D) any special meaning intended by the parties.

92. As is manifest from this list of Article 31 interpretative criteria, the application of the ‘general rule’, if stringently applied, will be a multi-faceted exercise requiring a good deal of inquiry by the interpreter. Rarely do international courts and tribunals, including FIATs, indicate in their decisions that they have checked each one of these mandated requirements when called upon to interpret treaties. Many international courts and tribunals, including FIATs, find sufficiency in applying selected elements of Article 31. This practice falls short of a faithful application of Article 31 as an integrated whole. Richard Gardiner arrived at the following conclusion after his detailed analysis of the interpretative techniques deployed in the *CSOB* case:

In this case one sees how many matters for interpretation were approached using appropriate elements of the [Vienna Convention Rules]. There was not, however, a systematic application of each part of the general rule, followed by assessment of whether to refer to supplementary means of interpretation (circumstances of conclusion of preparatory work). The tribunal applied such of the rules as were appropriate, including reference to accounts of the preparatory work at an early stage of its interpretation on one

¹⁷¹ *YILC* (1966-II), at 220, para. 8. This position is also confirmed by Gardiner, *Treaty Interpretation* (2008), at 33-38; Sinclair, *supra* note 6, at 119 *et seq.* and *Oppenheim*, *supra* note 4, at 1272, § 632. But see Aust, *supra* note 4, at 186-87 ([t]he singular noun [i.e., ‘rule’] emphasises that the article contains only one rule, that set out in paragraph 1’); and also *Decision regarding Delimitation of the Border*, 13 April 2002 (Eritrea v Ethiopia), Eritrea-Ethiopia Boundary Commission, 41 ILM 1057 (2002), at para. 3.4, which recited the content of Article 31(1)—without making an explicit reference to that provision—and described it simply as the ‘general rule’.

point. This is consistent with the practice adopted in many courts and tribunals, even if not with a narrow reading of the Vienna Convention.¹⁷²

93. Evidence that FIATs often do not apply all the Article 31 criteria is contained in the findings of the Fauchald empirical analysis. That study of FIAT decisions reveals that out of the 98 ICSID decisions reviewed, 35 referred to the Vienna Convention interpretation rules but only 16 of these decisions extended their examination beyond the Article 31(1) criteria.¹⁷³ These figures may also suggest that FIATs consider the first paragraph in Article 31 more important than the other paragraphs of that Article.

94. But the above practice does not mean that Articles 31(2) to (4) are generally considered by international tribunals to be meaningless. Their lack of use must be viewed in light of the practicalities of the decision making process. From perspective of the efficiencies at play, it would be unduly burdensome to require this process to be carried out for each and every interpretation, particularly where (as is often the case) a more economical means of determining the meaning is available to the tribunal.

95. With regard to the sequence of the paragraphs as they appear in Article 31, this position in which one paragraph is found does not ascribe any level of importance to be given to its provisions. The ILC commented that Article 31

when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article.¹⁷⁴

¹⁷² Gardiner, *Treaty Interpretation* (2008), at 45. Two notable exceptions to this general practice are the application of the Vienna Convention Rules in *Agua del Tunari* and *Plama*.

¹⁷³ Fauchald, *supra* note 11, at 314.

¹⁷⁴ *YILC* (1966-II), at 220, para. 9. See also Aust, *supra* note 4, at 187. McLachlan has observed that '[a]lthough the Convention does not require the interpreter to apply its process in the order listed in Articles 31-2, in fact that order is intuitively likely to represent an effective sequence in which to approach the task.' McLachlan, 'The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention', 54 *International and Comparative Law Quarterly* 279 (2005), at 291.

The intention of the ILC thus was that the four paragraphs of Article 31 should not be ranked so as to give one paragraph more weight than another.¹⁷⁵

96. This Chapter will proceed to examine the general international law position and FIAT practice relating to each of the four paragraphs of Article 31. Each paragraph will be considered separately.

B. ARTICLE 31(1)

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁷⁶

1. Generally

a) International Law Practice

97. The interpretative process articulated in Article 31(1) — sometimes referred to as the ‘golden rule’ of treaty interpretation¹⁷⁷ — may be dissected into four elementary criteria: (1) good faith; (2) ordinary meaning; (3) context; and (4) object and purpose.¹⁷⁸

¹⁷⁵ Contrast Reuter, *Introduction to the Law of Treaties* (1989), at 97 (Article 31 interpretations ‘must be based simultaneously on the “context” (paragraph 2) and on other elements (paragraph 3) which appear to carry less weight.’).

¹⁷⁶ This provision evolved from the following ILC draft articles: Article 70(1), Waldock III, *YILC* (1964-II), at 52; Article 69(1), ILC Draft Articles 1964, *YILC* (1964-II), at 199; and Article 27(1), ILC Draft Articles 1966, *YILC* (1966-II), at 217. See Annex II.

¹⁷⁷ See, e.g., Arécheaga, Hague Lectures, at 43.

¹⁷⁸ Contrast the ILC’s position that Article 31 was comprised of ‘three separate principles’: (1) ‘interpretation in good faith’; (2) ‘parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them’; (3) ‘the ordinary meaning of a term must not be determined in the abstract but in the context of the treaty and in the light of its object and purpose’. *YILC* (1966-II), at 221, para. 12. This section of the ILC’s commentary is quoted with approval in *Methanex (Partial Award)*, at para. 98.

98. On its face, Article 31(1) offers no explicit order of importance in relation to its four criteria.¹⁷⁹ However, an analysis of the ILC Commentary indicates a preference for the ordinary meaning, for example, ‘by the fact that ... “*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*”.’¹⁸⁰ A endorsement of the ILC’s approach is contained in the ICJ’s unequivocal statement in the *Libya v Chad* case: ‘interpretation must be based above all upon the text of the treaty.’¹⁸¹ The ILC added that:

the text must be presumed to be the authentic expression of the intentions of the parties; and that in consequence, the starting point of interpretation is the elucidation of the meaning of the text [of a treaty], not an investigation *ab initio* into the intentions of the parties.¹⁸²

99. In other words, the interpretation should give due respect to the intentions of the parties as recorded in the text without conducting wide-ranging searches for intentions from extraneous sources.¹⁸³ Although the ascertainment of the parties’

¹⁷⁹ See, e.g., *YILC* (1966-II), at 219-20, para. 8 ([a]ll the various elements [of Article 31], as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation’); and Aust, *Handbook of International Law* (2005), at 89 (Article 31(1) ‘gives no greater weight to one particular factor, such as the text (‘textual’ or ‘literal’ approach), or the supposed intentions of the parties, or the object and purpose of the treaty (‘effective’ or ‘teleological’ approach)’).

¹⁸⁰ *YILC* (1966-II), at 220, para. 11, quoting the Institute of International Law, 44 *AIDI* (1944-I), at 199 (‘the signed text is, aside from rare exceptions, the sole and most recent expression of the common consent of the parties’ (author’s translation)).

¹⁸¹ ICJ Reports 6 (1994), at 22, para. 42. See also Aust, *supra* note 4, at 188 (‘[i]t is important to give a term its *ordinary meaning* since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended.’); Reuter, *Introduction to the Law of Treaties* (1989), at 96-7 (‘The purpose of interpretation is to ascertain the intention of the parties from a text ... The primacy of the text, especially in international law, is the cardinal rule for any interpretation.’); Oppenheim, *supra* note 4, at 1267 (‘The purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen.’); and Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of *non-refoulement*: Opinion’, in Feller, Türk and Volker (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 87 (2003), at 104 (observing that in interpreting the terms of a treaty ‘the text of a treaty will be the starting point’). See also Judge ad hoc Chagala’s opinion in the *Case concerning Right of Passage Over Indian Territory*, (Portugal v. India) (Preliminary Objections) Judgment, ICJ Reports (1957), p. 167 (‘No cannon of construction is more firmly established than the one which lays down that the intention of a party to an instrument must be gathered from the instrument itself and not from what the party says its intention was’).

¹⁸² *YILC* (1966-II), at 220, para. 11. See also Sinclair, *supra* note 6, at 115.

¹⁸³ Gardiner, *Treaty Interpretation* (2008), at 8.

intentions is not far removed from the goal of treaty interpretation, an explicit reference to the intentions of the parties is notably absent in Article 31(1).¹⁸⁴ A reason that disfavors the intentions approach was well put by Judge Keith:

Removing intention from the process avoids what will often in fact be a fiction ... The matter may be one that could not have conceivably been within the contemplation of those preparing the text or, if it was, they may have disagreed expressly or silently on it. Emphasising the text along with the purpose and context facilitates, as is often appropriate, the application of the text to changing facts and contexts. Next, that approach emphasises the objective rather than the subjective. Further, if the interpreter does address the purpose of the text, also referring to intention may add nothing to the inquiry and may simply cause confusion.¹⁸⁵

100. A strong advocate of the intentions of the parties approach was Hersch Lauterpacht, who took the view that

[i]t is the intention of the authors of the legal rule in question—whether it be contract, a treaty, or a statute—which is the starting-point and goal of all interpretation. It is the duty of the judge to resort to all available means ... to discover the intentions of the parties ... But to assert ... that intention is irrelevant and that what matters are the ‘plain words’ of the text, is, in the long run, to divest the task of interpretation of its scientific character and its true purpose. Words have no absolute meaning in themselves.’¹⁸⁶

101. Professor Lauterpacht was involved in drafting an *Institut de Droit International* resolution on treaty interpretation rules and sought to include the search

¹⁸⁴ The only express reference in the Vienna Convention Rules to the intentions approach is found in Article 31(4).

¹⁸⁵ Keith, *Interpreting Treaties, Statutes and Contracts*, Occasional Paper No. 19, New Zealand Centre for Public Law, Victoria University of Wellington, May 2009, at 5. In Judge Torres Bernárdez’s Separate Opinion in *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), Judgment, ICJ Reports (1992), 629, at 718, para. 189, the view was taken that ‘rules of treaty interpretation disregard any intentions of the parties to the treaty as a subjective element distinct from the text of the treaty. Subjective intentions alien to the text of the treaty, particularly *a posteriori* subjective intentions, should play no role in the interpretation.’ See also Gardiner, *Treaty Interpretation* (2008), at 6 (ascertainment of the intention is ‘the sense of the true meaning of the treaty rather than the intention of the parties distinct from it’); Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and Other Treaty Points’, 33 *BYBIL* 203 (1957), at 205-6 and Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law’, 30 *BYBIL* 1 (1953), at 4.

¹⁸⁶ Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 26 *British Yearbook of International Law* 48 (1949), at 83. The intentions approach can be traced back as far as Aristotle, who said that when general laws operate unjustly in unusual situations, they should be interpreted according to ‘what the legislator himself would have said had he been present and would have put in his law had he known’. Aristotle, *Nicomachean Ethics*, V. 10 (1137b 22-4).

for the intention of the parties as a primary goal of interpretation in those rules.¹⁸⁷ But ultimately, the *Institut* did not adopt the intentions approach in its resolution on the basis that ‘the intention of the parties is often difficult to establish’ and in some cases ‘the parties have no common intention.’¹⁸⁸ The approach finally adopted by the Institut in relation to intentions was also followed by the ILC when it drafted the Vienna Convention Rules.

b) FIAT Practice

102. Consistent with the international law position described above, the absence of hierarchy among the ordinary meaning, context, and object and purpose criteria was recognised by the *Aguas del Tunari* tribunal when it said:

the Vienna Convention does not privilege any one of these three aspects of the interpretation method [i.e., the ordinary meaning, context and object and purpose]. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word ‘meaning’ itself has at least sixteen dictionary meanings. Rather, the interpretation of a word involves a complex task of considering the ordinary meaning of a word or a phrase in the context in which that word or phrase is found and in light of the object and purpose of the document.¹⁸⁹

103. Notwithstanding the above passage, FIAT awards reviewed demonstrate that when applying Article 31(1) of the Vienna Convention, FIATs place considerable importance on the text of the treaty. This practice is similar to the general approach under international law described above. In relation to the role played by the intentions of the parties, the *Methanex* tribunal approved the statement of the ILC quoted in the International Law section above when it observed:

¹⁸⁷ Lauterpacht, ‘De l’interprétation des traités: Observations complémentaires et projet définitif de Résolutions’, 44 *Annuaire de l’Institut de Droit International* (1952), Vol. 1, at 222.

¹⁸⁸ Lauterpacht, 46 *Annuaire de l’Institut de Droit International* 319-20 (1956).

¹⁸⁹ *Aguas del Tunari*, at para. 91, citing Schwarzenberger, ‘Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties’, 22 *Current Legal Problems* 205 (1969), at 219. See also *Canadian Cattlemen*, at para. 116, n. 1.

the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.¹⁹⁰

104. This issue of the predominance of the text in treaty interpretation is discussed in Section B(3) below.

2. Good Faith

a) International Law Practice

105. The first criterion mentioned in Article 31(1) is that a treaty be interpreted in good faith. A precise and authoritative definition of this seemingly rudimentary term has proved allusive.¹⁹¹ The essence of the doctrine has been broadly described by Bin Cheng as requiring ‘obedience to a standard of honesty, loyalty, and fair dealing, in short of morality, in international conduct’.¹⁹² In international law, good faith is connected to the broad principle of *pacta sunt servanda*, a fundamental cornerstone of treaty law.¹⁹³ The ILC indicated in this regard that ‘the interpretation of treaties in

¹⁹⁰ *Methanex (Final Award)*, at Part II, Chpt. B, para. 22, citing *Yearbook of the International Law Commission*, 1966, Vol. II, p. 223, para. 18. This issue of the predominance of the text in treaty interpretation is discussed in Chapter III, Section B(3) below. See also *Tza Yap Shum*, at para. 72; and *Methanex (Final Award)*, Part IV, Chpt. B, para. 37 (‘[i]nternational law directs this Tribunal, first and foremost, to the text; here, the text and the drafters’ intentions, which it manifests, show that trade provisions were not to be transported to investment provisions’), Part II, Chpt. B, para. 5 and Part IV, Chapt. B, para. 35. See also *Salini v Jordan (Jurisdiction)*, at para. 79 (‘[t]he common intention of the Parties is reflected in this clear text that the Tribunal has to apply’) and para. 110. The text may be viewed as encompassing the treaty’s preamble as well. See *Siemens (Jurisdiction)*, at para. 81.

¹⁹¹ Lord Hobhouse perceptively remarked that that a concept such as good faith ‘can be illustrated but not defined’. *Russell v Russell* [1897] AC 395, at 436 (HL).

¹⁹² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 389. He thereafter referred to these striking words of Lord Coleridge:

Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence.

The Queen v Tom Dudley and Edwin Stephens (1884) 19 QBD 273, at 287. See also Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law’, 30 *BYBIL* 1 (1953), at 12-13 (commenting that good faith requires a State to act in such a way that it does not act arbitrarily or capriciously, or abuse its rights).

¹⁹³ This principle prescribes that every treaty is binding upon its parties and must be performed in good faith. For relevant international jurisprudence, see, e.g., Article 2(2) of the Charter of the United Nations (1945); Article 26 of the Vienna Convention; *Land and Maritime Boundary between Cameroon and Nigeria* case, (Preliminary Objections) ICJ Reports 275 (1998), at 296, para. 38; Bin

good faith and according to law is essential if the *pacta sunt servanda* rule is to have any meaning'.¹⁹⁴

106. Relatively little jurisprudence by international tribunals has been found that elaborates on the role played by good faith in treaty interpretation. This is confirmed by Gardiner's observation that the 'ICJ has little to say about good faith as such in treaty interpretation beyond referring to it as part of its frequent reiteration of article 31(1) of the Vienna Rules as customary law applicable to treaty interpretation.'¹⁹⁵ Perhaps most useful is Lord McNair's observation that it would be a breach of the good faith obligation 'for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.'¹⁹⁶

107. On the ability of the good faith criterion to dislodge the application of the ordinary meaning criterion, Waldock has stated:

only when interpretation in good faith leaves a *real doubt* as to the meaning is it permissible to set aside the natural and ordinary meaning of the terms of the treaty in favour of some other meaning.¹⁹⁷

108. Very rarely would an issue arise as to whether an arbitral tribunal failed to exercise good faith in its interpretation because it is constituted, in principle, by independent and impartial persons. More likely is the accusation that a party to the dispute failed to exercise good faith in interpreting a treaty. Thus, in the context of a

Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 105 *et seq.*; Goodwin-Gill, 'State Responsibility and the 'Good Faith' Obligation in International Law', in Fitzmaurice and Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), at 85 *ff.*; Kolb, *La bonne foi en droit international public* 179-207 (2000); and Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), at 135-179.

¹⁹⁴ See *YILC* (1966-II), at 219, para. 5. See also Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités', 151 *Recueil des cours* 1 (1976-III), at 20 and 22.

¹⁹⁵ Gardiner, *International Law* (2003), at 152.

¹⁹⁶ McNair, *The Law of Treaties* (1961), at 465. In relation to the use of good faith in the interpretation of arbitration agreements, see Gaillard and Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at para. 477 ('a party's true intentions should always prevail over its declared intention'). Also see the reference to good faith in the interpretation provision of the CISG (Article 7).

¹⁹⁷ *YILC* (1964-II), at 57, para. 16 (emphasis added).

tribunal interpreting a treaty, Sinclair helpfully indicates that the good faith that the tribunal must maintain is that of the parties if they (the parties) were themselves called upon to interpret the disputed text.¹⁹⁸

109. Although found in Article 31(1), the good faith obligation is considered not to be limited to that provision—it covers all other stages of the interpretative process and applies equally to an examination of subsequent practice, recourse to preparatory work or reconciling the meaning of multilingual texts.¹⁹⁹ In particular regard to the preparatory work, Aust has written:

It has been suggested that, even when the ordinary meaning appears to be clear, if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, the primary duty in Article 31(1) to interpret a treaty in good faith requires a court to ‘correct’ the ordinary meaning. This is no doubt how things work in practice; for example, the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it. The suggestion is therefore a useful addition to the endless debate on the principles of interpretation.²⁰⁰

This statement does not fully conform with the framework of the Vienna Convention Rules (as will be seen in the discussion on Article 32) but it is somewhat indicative of the ways courts and tribunals justify departure from the rules.

b) FIAT Practice

110. FIAT references to the good faith criterion in interpretation are scarce. This tendency mirrors the slender amount of discussion by international tribunals on the subject.²⁰¹ The good faith criterion was rather boldly described by the majority in

¹⁹⁸ See, Sinclair, *supra* note 6, at 120.

¹⁹⁹ *Ibid.*

²⁰⁰ Aust, *supra* note 4, at 197 (footnotes omitted), citing Schwebel, ‘May Preparatory Work Be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?’, in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), 541-547.

²⁰¹ For a detailed discussion on the role of good faith in the minimum standard of protection afforded by NAFTA Article 1105, see Weiler, ‘Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico’, in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 701 (2005), at 719 *et seq.*

Hrvatska as ‘the core principle about which all else revolves’.²⁰² However, this does not reflect the understanding or treatment of this criterion in other FIAT awards. Indeed, Jan Paulsson in his Individual Opinion in *Hrvatska* firmly rejected the majority’s view. He considered that the majority incorrectly used its statement above first to apply the good faith criterion in order to arrive at a certain result and only thereafter embark upon an interpretation to justify the desired result.²⁰³

111. The following passage in the *Aguas del Tunari* award, that deals with Article 31 in detail but fails to mention good faith, is illustrative of the treatment (by silence or omission) of the good faith criterion in FIAT awards:

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.²⁰⁴

112. Despite the rare application of the good faith criterion, there have been a number of peripheral discussions by FIATs that help provide a better understanding as to how this criterion operates in the interpretative process.

113. The decision in *Plama* appears to indicate that the tribunal considered an interpretation contrary to good faith as one that results in a ‘gross manipulation’ of the language of the treaty;²⁰⁵ or one that would deprive the investor of any certainty as to its rights and the host country’s obligations.²⁰⁶ According to the *Tecmed* award,

²⁰² *Hrvatska*, at para. 191.

²⁰³ *Hrvatska*, Jan Paulsson Individual Opinion, at para. 51. See also paras. 7 and 47.

²⁰⁴ *Aguas del Tunari*, at para. 91. This description mirrors an idea by Max Huber. He is said to have considered the process of interpretation as one of ‘*encerclement progressif*’ of a text. The relevant observations of Huber are referred to (without citation of the source) in Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 1 (1978), at 44. A similar omission of an application of the good faith criterion was made in the detailed application of the Vienna Convention Rules in *Canadian Cattlemen*.

²⁰⁵ *Plama (Jurisdiction)*, at para. 147.

²⁰⁶ *Plama (Jurisdiction)*, at para. 163-64.

conduct that transgresses the principle of good faith need not be intentional, manifestly damaging or fraudulent.²⁰⁷

114. In relation to investor-State agreements to arbitrate, some FIATs have observed that a good faith interpretation must take into account the consequences which the parties must ‘reasonably and legitimately be considered to have envisaged as flowing from their undertakings’.²⁰⁸

115. The *Methanex* case is illustrative as to the statement made by Sinclair in the International Law section above as to the perspective from which good faith is to be evaluated. In that case the tribunal quoted with approval the ILC’s statement that interpretation in good faith flows directly from the rule *pacta sunt servanda*²⁰⁹ and explicitly acknowledged that all parties had submitted their interpretations in good faith.²¹⁰

3. Ordinary Meaning

a) International Law Practice

116. The second Article 31(1) criterion requires a treaty to be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty.’ A wide array of terminology has been deployed by international courts and tribunals to refer to it. The most frequently used term has been ‘natural and ordinary meaning.’²¹¹ Other terms that have been adopted include the

²⁰⁷ *Tecmed*, at para. 71.

²⁰⁸ *SOABI (Award)*, at para. 4.10. See also *Amco (Jurisdiction)*, at para. 14(i); *CSOB (Jurisdiction)*, at para. 34; and *CSOB (Further Decision on Jurisdiction)*, at para. 24.

²⁰⁹ *Methanex (Partial Award)*, at para. 98, citing *YILC* (1966-II), commentary to draft article 27, at para. 12. See also *Amco (Jurisdiction)*, at para. 14(i).

²¹⁰ *Methanex (Partial Award)*, at para. 135

²¹¹ See, e.g., *Competence of the General Assembly regarding Admission to the United Nations*, Advisory Opinion, ICJ Reports 4 (1950), at 8 (‘the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.’); *Interpretation of Peace Treaties (Second*

- d) 'natural meaning';²¹²
- e) 'natural sense';²¹³
- f) 'meaning and scope';²¹⁴
- g) 'reasonable meaning';²¹⁵
- h) 'usual or common meaning';²¹⁶
- i) 'real meaning';²¹⁷
- j) 'true meaning';²¹⁸
- k) 'ordinary sense';²¹⁹
- l) 'tenor';²²⁰

Phase), ICJ Reports 221 (1950), at 226-30 (the 'natural and ordinary meaning of the terms' of a treaty took precedence over the principle of effectiveness); the *Asylum* case, ICJ Reports 266 (1950), at 279; *Case concerning the Rights of Nationals of the United States of America in Morocco*, ICJ Reports 176 (1952), at 195; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, ICJ Reports 150 (1960), at 159-60; *Temple of Preah Vihear*, ICJ Reports 17 (1961), at 32; *South-West Africa* cases (Preliminary Objections), ICJ Reports 319 (1962), at 343; and Article 1(1) of the Institute of International Law's 1956 Resolution, 46 *AIDI* 364-5 (1956).

²¹² *Exchange of Greek and Turkish Populations*, Advisory Opinion, PCIJ, Ser. B, No. 10 (1925), at 21; *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Reports 57 (1948), at 62-3; *Italy v Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, 29 ILR 442 (1959), at 449; and *Air Transport Services Agreement Arbitration*, (US v. France) 38 ILR 182 (1963), at 229-30.

²¹³ *Employment of Women at Night*, PCIJ, Ser. A/B, No. 50, at 373; and *Re Competence of Conciliation Commission*, Anglo-Italian Conciliation Commission, 22 ILR 867 (1955), at 871.

²¹⁴ *Exchange of Greek and Turkish Populations*, Advisory Opinion, PCIJ, Ser. B, No. 10 (1925), at 17.

²¹⁵ *Pertulosa Claim*, Franco-Italian Conciliation Comm., 18 ILR 414 (1951), at 417.

²¹⁶ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, ICJ Reports 150 (1960), at 158.

²¹⁷ *Anglo-Iranian Oil* case, Jurisdiction, ICJ Reports 93 (1952), at 105.

²¹⁸ *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, PCIJ, Ser. B, No. 2 (1922), at 39.

²¹⁹ *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11 (1925), at p. 37; and *Case concerning Right of Passage Over Indian Territory*, Preliminary Objections, Judgment, ICJ Reports (1957), at 142.

²²⁰ *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, PCIJ, Ser. B, No. 14 (1927), at 52.

m) 'plain language';²²¹

n) 'sense' the words 'would normally have';²²² and

o) 'grammatical and logical meaning'.²²³

117. In each case, no indication has been provided that these variations signify a departure from the sense denoted by the phrase 'natural and ordinary meaning.'²²⁴ Without a contrary indication, it is assumed that these different terms essentially possess the same meaning.

118. As discussed previously, the ILC described the Article 31(1) ordinary meaning criterion as 'the very essence of the textual approach'.²²⁵ But what does the 'ordinary meaning' or textual approach actually signify?

119. Dictionaries have been used as aids in the quest for the ordinary meaning of treaty texts.²²⁶ The WTO Appellate Body has taken the view that while dictionaries may be useful, they also have limitations. In one case it stated that 'dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents.'²²⁷ In another it warned 'dictionary definitions have their limitations in revealing the ordinary meaning of a term. This is especially true where the meanings of terms used in the different authentic texts of the *WTO*

²²¹ *Martini case*, (1903) 10 RIAA 644, 663-4; *Ambatielos case*, Jurisdiction, Judgment, ICJ Reports 28 (1952), at 41. See also the reference to 'plain terms' in *The SS 'Wimbledon'* case, Judgment on Intervention by Poland, PCIJ, Ser. A, No. 1, at 25.

²²² *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11 (1925), at 39.

²²³ *Factory at Chorzów*, Judgment, PCIJ, Ser. A, No. 9 (1927), at 24.

²²⁴ Noteworthy here is the following critical comment by McNair: 'A mon avis, il faut éviter des expressions comme « sens clair », « sens évident », et leur préférer les formules « sens naturel », « sens ordinaire », parce que les mots « clair », « évident », sont plus subjectifs que les mots « naturel », « ordinaire ». Clair, évident ? A qui ?' McNair, 43 *AIDI* 448 (1950-I), at 449.

²²⁵ *YILC* (1966-II), at 221, para. 12.

²²⁶ See generally, Gardiner, *Treaty Interpretation* (2008), at 166-169.

²²⁷ *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of WTO Appellate Body, 16 January 2003, WT/DS217/AB/R and WT/DS234/AB/R, at para. 248.

Agreement are susceptible to differences in scope.²²⁸ Similarly, in *Avena and other Mexican Nationals*, the ICJ considered that the diverse dictionary meanings of the term ‘without delay’ made it necessary to look elsewhere to understand this term.²²⁹

120. The ICJ in the *Temple* case held that ‘the principle of the ordinary meaning does not entail that words and phrases are always to be interpreted in a purely literal way.’²³⁰ This observation articulates a relatively straightforward aspect of the ordinary meaning criterion. In contrast, the question as to what may precisely be considered ‘ordinary’ raises many questions. Such a task is far more difficult than what such a simple term first suggests. For example, Judge Spender drew attention to the problems of finding an ‘ordinary’ meaning in treaty language when he made the following observation in the *Expenses* case:

[t]he ordinary and natural sense of words may at times be a matter of considerable difficulty to determine. What is their ordinary and natural sense to one may not be so to another. The interpreter not uncommonly has, what has been described as, a personal feeling towards certain words and phrases. What makes sense to one may not make sense to another. Ambiguity may lie hidden in the plainest and most simple words even in their natural and ordinary meaning.²³¹

²²⁸ *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Report of WTO Appellate Body, 19 January 2004, WT/DS257/AB/R, at para. 59.

²²⁹ ICJ Reports 12 (2004), at 48, para. 84.

²³⁰ ICJ Reports 17 (1961), at 32. See also Sinclair, *supra* note 6, at 121 (the ordinary meaning ‘does not necessarily result from a pure grammatical analysis’) and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 114.

²³¹ ICJ Reports 151 (1962), at 184. As to other difficulties faced by the ICJ as to the ordinary meaning of terms, see Thirlway, *supra* note 91, at 24 *et seq.* Professor Hartley has pertinently observed that ‘it is a well known fact that what is clear to one set of lawyers can be extremely doubtful to another set of lawyers. This is especially true where the two groups belong to different legal traditions or look at the law from different points of view.’ T.C. Hartley, *The Foundations of European Community Law* (Oxford: Clarendon 1988), at 271. While Professor Hartley was commenting on European law, his remarks apply with equal force to the present topic. In this regard, see the observation by Lord Goff on the *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia)* [1983] 1 AC 736 (HL); [1982] 2 Lloyd’s Rep 307. That case turned on the term ‘employed’ in a contractual document. The word was used in the phrase ‘the vessel to be employed between good and safe ports’. Six commercial judges considered the term as a reference to the vessel’s actual employment under contract. The House of Lords, in contrast, felt that it referred to the orders given by the ship’s charterers. Lord Goff’s conclusion was that ‘the case illustrates vividly how a few apparently simple words can give rise to a profound difference of opinion among very experienced judges; and how all the principles of construction in the world cannot avoid the fact that different people may form different views, and that interpretation of commercial documents will remain until the end of time a topic which can give rise to

121. A search for the ordinary meaning lies at the start of the interpretative process, as was indicated by the ICJ:

the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.²³²

122. This may indicate the ordinary meaning of words in their context may play a determinative role in interpretation. However, in a later decision, the ICJ drew attention to the need also to consider the object and purpose, holding that the ordinary meaning of words

is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly be placed on it.²³³

123. Note should be made that in this pre-Vienna Convention case, the ICJ seemed to be making reference to the purpose and context of a clause or the treaty. This approach lacks congruence with Article 31 of the Vienna Convention, which speaks more precisely of the context of the *terms* and the purpose of the *treaty*.

124. As is indicative in Chapter III, Section B(1), there is a significant body of international jurisprudence that gives prominence to the text (and thus the ordinary meaning) when interpreting treaties. A direct affirmation of this practice in respect of the WTO Appellate Body's practice is provided by Claus-Dieter Ehlermann:

[o]f the three criteria mentioned in Article [31(1)] of the Vienna Convention (ordinary meaning of the terms of the treaty; context; object and purpose), the Appellate Body has

differences of opinion of this kind. We can only do our best.' Lord Goff, 'Commercial Contracts and the Commercial Court', [1984] *Lloyd's Maritime and Commercial Law Quarterly* 382, at 391.

²³² *Competence of the General Assembly regarding Admission to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 4, at p. 8.

²³³ *South-West Africa* cases, (Ethiopia v. South Africa, Liberia v. South Africa) (Preliminary Objections), Judgment of 21 December 1962, ICJ Reports 1962, p. 319, at p. 336.

clearly attached the greatest weight to the first, the ordinary meaning of the terms of the treaty.²³⁴

125. Similarly, some commentators also take the view that the ordinary meaning criterion is *primus inter pares*. Aust, for example, in commenting on Article 31(1) considers that ‘although paragraph 1 contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence to the textual.’ The view expressed by Sinclair is that

reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified.²³⁵

126. A more expansive approach to the object and purpose has been adopted by the European Court of Human Rights and the European Court of Justice, which approach is discussed in Section B(5) below.

127. It may be concluded from the above that the position of international courts and tribunals in relation to the importance to be given to the ordinary meaning is not altogether consistent but viewed as a whole there is generally an emphasis on the text.

b) FIAT Practice

128. The ordinary meaning criterion in the treaty interpretation practice of FIATs, much like international law in general, finds expression in various forms. Although

²³⁴ Claus-Dieter Ehlermann, ‘Reflections on the Appellate Body of the World Trade Organisation (WTO)’, in American Society of International Law, *Proceedings of the 97th Annual Meeting* 77 (2003), at 80. See also Frederico Ortino, ‘Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling: A Critique*’, 9 *Journal of International Economic Law* 117 (2006).

²³⁵ Sinclair, *supra* note 6, at 130.

many references have been made specifically to the ‘ordinary meaning’,²³⁶ other terminology that has been employed and that seemingly has equivalence include the:

- a) ‘natural and fair meaning’;²³⁷
- b) ‘natural and ordinary meaning’;²³⁸
- c) ‘natural and obvious sense’;²³⁹
- d) ‘ordinary or grammatical meaning’;²⁴⁰
- e) ‘language’;²⁴¹
- f) ‘plain language’;²⁴²
- g) ‘plain meaning’;²⁴³
- h) ‘plain wording’;²⁴⁴
- i) ‘plain and natural language’;²⁴⁵

²³⁶ See, e.g., *Tokios (Jurisdiction)*, para. 85; *Champion Trading Company v Egypt*, 19 ICSID Review, at p. 288; *Pope & Talbot (Interim Award)*, at para 69; *Siemens (Jurisdiction)*, at para. 93; *Methanex (Final Award)*, Part II, Chpt. H, para. 20.

²³⁷ *AAP*, at paras. 51 and 61.

²³⁸ Dissenting Opinion of Keith Highet in *Waste Management*, at 469, para. 24. Interestingly, this phrase was used in Waldock III, *YILC* (1964-II), at 52 but the word ‘natural’ was subsequently dropped without explanation in the ILC’s 1964 draft articles on the law of treaties. See *YILC* (1964-II), at 199.

²³⁹ *AAP*, at 268, para. 47.

²⁴⁰ *SPP (Jurisdiction)*, 147, at para. 74.

²⁴¹ *Maffezini (Jurisdiction)*, at 402, para. 31.

²⁴² *AAP*, at para. 66; Dissenting Opinion of Dr. El Mahdi in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, Award of 20 May 1992, 3 ICSID Rep. 189, at 322.

²⁴³ *Eureko*, at para. 246. Note should be made here that the eighth edition of *Black’s Law Dictionary* considers the phrase ‘ordinary meaning’ as synonymous with ‘plain meaning’. This latter is a common term used in interpreting United States statutes. See, e.g., *Qi-Zhou v Meissner*, 70 F.3d 136, 140 (D.C.Cir.1995) (‘[w]here ... the plain language of the statute is clear, the court generally will not inquire further into its meaning, at least in the absence of a clearly expressed legislative intent to the contrary’) (internal quotation and citations omitted).

²⁴⁴ *Lauder*, at para. 219.

²⁴⁵ *Methanex (Final Award)*, Part IV, Chapt. B, para. 29 and Part IV, Chapt. C, para. 14.

- j) ‘fair meaning’;²⁴⁶
- k) ‘common use’;²⁴⁷ and
- l) ‘*usus loquendi*’.²⁴⁸

129. Displaying consistency with international law jurisprudence, FIATs have held that the ordinary meaning does not constitute the literal meaning,²⁴⁹ and, generally, the starting point of any FIAT interpretation is the text of the treaty at issue. The *Methanex* tribunal emphasised this latter position when it held that ‘[i]nternational law directs this Tribunal, first and foremost, to the text’.²⁵⁰ Many other FIATs have expressed similar views.²⁵¹ FIATs tend to favour the textual approach because it gives primacy to the documentary record of the agreement reached by the State parties.²⁵² The text of a treaty may also evidence other Article 31 criteria. This dual role of the text was indicated by the *ADF* tribunal when it observed:

We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty

²⁴⁶ *AAP*, at 268, para. 47.

²⁴⁷ *AAP*, at para. 40 (Rule (B)) and para. 47.

²⁴⁸ *AAP*, at para. 40 (Rule (B)) and para 47.

²⁴⁹ See, e.g., *Methanex (Partial Award)*, at para. 136 (‘there is a difference between a *literal meaning* and the ordinary meaning of a legal phrase’); *Siemens (Jurisdiction)*, at para. 92; and *Methanex (Final Award)*, at Part II, Chpt. B, para. 16 (stating in regard to the interpretation in accordance with the ordinary meaning of a term that ‘several scholars have noted that this is not merely a semantic exercise in uncovering the mere literal meaning of a term’).

²⁵⁰ *Methanex (Final Award)*, at Part IV, Chpt. B, para. 37.

²⁵¹ See, e.g., *Yukos (Interim Award)*, at para. 411 (‘according to Article 31 of the [Vienna Convention], a treaty must be interpreted first on the basis of its plain language’); *SGS v Philippines*, at paras. 114 and 116 (‘[o]ne must begin with the actual text’ and the text ‘means what it says’); *Hrvatska*, Jan Paulsson Individual Opinion, at paras. 47 and 48; and *Pope & Talbot (Interim Award)*, at para 69 (quoting with approval the WTO Appellate Body’s view in *Japan – Taxes on Alcoholic Beverages* (4 October 1996) that ‘[i]nterpretation must be based above all on the text of the treaty’); *SPP (Jurisdiction)*, 147, at para. 74; *Tecmed*, at para. 121; and *Gruslin*, at paras. 21.4 and 21.6. As to the application of the textual approach in interpreting a domestic law that provides a State’s consent to ICSID jurisdiction, see *Tradex (Jurisdiction)*, at 59. See also the English High Court decision in *Czech Republic v European Media Ventures SA*, [2007] EWHC 2851 (Comm), at para. 16

²⁵² See, e.g., *Tokios (Jurisdiction)*, at para. 82; *Methanex (Final Award)*, at Part II, Chpt. B, para. 22; and *Siemens (Jurisdiction)*, at para. 106.

are to be found, in the first instance, in the words in fact used by the parties in that paragraph.²⁵³

130. A few FIATs have taken the view that some terms they have been called upon to interpret have been clear and that their ordinary meaning has been beyond doubt. Consequently, they have seen no need for further interpretation, i.e., examination of the context or the treaty's object and purpose.²⁵⁴ A rationale for this approach was provided by the *AAP* tribunal as follows:

The first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. When a deed is worded in a clear and precise terms [*sic.*], when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents ...²⁵⁵

131. The text's dominant position vis-à-vis the context was highlighted by the *Salini v Jordan* tribunal when it held that 'the context cannot prevail over the general wording of the text'.²⁵⁶ A preference for the textual approach also manifests itself in the strong reluctance of many FIATs to read or imply terms into a treaty.²⁵⁷

²⁵³ *ADF (Award)*, at para. 147.

²⁵⁴ See, e.g., *Maffezini (Jurisdiction)*, at paras. 27, 32 and 35-36; and *Duke v Ecuador*, at paras. 318 and 324.

²⁵⁵ *AAP*, at 268, para. 47, quoting Vattel's *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), Vol. III, Chapt. XVII, at para. 263. See also *SGS v Philippines*, at para. 99; *Middle East Cement*, at paras 100-102; and *Gruslin*, at 501, para. 21.6. For an example of the application of this principle to an investor-State agreement, see *Aucoven (Jurisdiction)*, at para. 87 ('the Tribunal does not see any reason nor justification for departing from the clear meaning').

²⁵⁶ *Salini v Jordan (Jurisdiction)*, at para. 77. See also *ADF (Award)*, at para. 147.

²⁵⁷ See, e.g., *Plama (Jurisdiction)*, at paras. 203-4; *SGS v Pakistan*, at para. 177 ('[i]n the absence of such treaty language, we are not free to read into the Swiss-Pakistan BIT a requirement that would preclude a would-be claimant from resorting to other remedies in respect of contract claims prior to the exercise of its BIT rights'); Dissenting Opinion of Alberro-Semerena in *Aguas del Tunari*, at para. 27; *Tokios (Jurisdiction)*, at para. 52 ('we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources') and at para. 77 (rejecting an interpretation suggested by the respondent because it was 'plainly absent from the text'); *Methanex (Final Award)*, at Part IV, Chapt. C, para. 16 ('[w]hen the NAFTA Parties did not incorporate a non-discrimination requirement in a provision in which they might have done so, it would be wrong for a tribunal to pretend that they had'); *Methanex (Final Award)*, Part IV, Chapt. B, para. 35 ('the drafters did not insert the [words 'with respect to any like, directly competitive or substitutable goods'] in Article 1102 [of the NAFTA]; and it would be unwarranted for a tribunal interpreting the provision to act as if they had, unless there were clear indications elsewhere in the text that, at best, the drafters wished to do so or, at least, that they were not opposed to doing so'); *Sempra Energy (Jurisdiction)*, at

132. Notwithstanding the importance placed on the ordinary meaning or the text, even if such a meaning is considered to have been clear, it still may not be decisive. In *Aguas del Tunari*, for example, the tribunal took the view that the ordinary meaning of a certain phrase in dispute, ‘although clearly an essential element of the task of interpretation, is not determinative in this instance.’²⁵⁸

133. Even if an ordinary meaning of a term is clear, FIATs have been unwilling to be semantic. For example, in *Pope & Talbot*, Canada argued that the use of the plural form in Article 1102(2) of NAFTA (‘investments’ and ‘investors’) required more than one investor to be aggrieved for that provision to come into play. As part of its decision, the tribunal stated:

As a general principle of interpretation, use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case. Laws outlawing discrimination against ‘women’ or setting labour standards for ‘children’ could not reasonably be interpreted to prevent their application to a woman or a child.²⁵⁹

134. Similarly, in *Siemens*, although the relevant treaty text referred only to the grant of fair and equitable treatment to ‘investments’ it was held that to reserve such treatment only for *investments* and not *investors* was not in accord with the treaty’s

para. 146 (‘[t]he Tribunal cannot presume that intention if it is not expressly stated’); *Amco (Jurisdiction)*, at para. 12(iii); *Loewen (Award)*, at para. 230 (‘[t]here is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change’); *CME (Final Award)*, at para. 412 (holding that if it implemented the view of the respondent’s expert, Professor Schreuer, it would inject into the disputed choice-of-law treaty provision a requirement not contained in it); *SGS v Philippines*, at para. 118 (‘[i]f the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of substantive standards contained in the BIT, they would have said so expressly’), and 132(a), and 132(e); *Tokios (Jurisdiction)*, at para. 36 (‘[i]n our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history’) and at para. 52 (‘we do not believe that arbitrators should read into BITs limitations not found in the text nor evident from negotiating sources’); and *Methanex (Partial Award)*, at paras. 138 (‘it would require clear and explicit language to achieve this result’). See also *CME (Final Award)*, para. 412; and *Methanex (Partial Award)*, at para. 123; and *Tza Yap Shum*, at para. 111.

²⁵⁸ *Aguas del Tunari*, at para. 226. Other instances in which the ordinary meaning of words has not been considered decisive is where they are manifestly absurd or unreasonable (see particularly *Champion Trading Company v Egypt*, 19 ICSID Review, at p. 288), where a special meaning is clear from the treaty (discussed in Chapter III, Section E), or where the interpretation concerns procedural provisions (particularly concerning negotiation period provisions) (discussed below in Chapter VI, Section I).

²⁵⁹ *Pope & Talbot (Merits, Phase 2)*, at para. 37.

purpose, despite the absence of an explicit reference to investors.²⁶⁰ This reluctance to be semantic may also be connected with the duty to carry out the interpretation in good faith.

135. FIATs have frequently shown a willingness to refer to dictionary definitions of words to cast light on the ordinary meaning of terms.²⁶¹ Usually, these definitions offer some degree of guidance but care needs to be exercised, as was indicated by the tribunal in *Methanex (Partial Award)*. In that case, the tribunal referred to a number of dictionaries to interpret the phrase ‘relating to’ but found that

none of these dictionary definitions decide the issue. To a limited extent, they support the USA’s reliance on the requirement of a “connection”. These definitions imply a connection beyond a mere impact, which is all that the term “affecting” involves on Methanex’s interpretation. Nevertheless, we do not consider that this issue can be decided on a purely semantic basis; and there is a difference between a literal meaning and the ordinary meaning of a legal phrase. It is also necessary to consider the ordinary meaning of the term in its context and in the light of the object and purpose of NAFTA and, in particular, Chapter 11 (as required by Article 31(1) of the Vienna Convention).²⁶²

136. McLachlan, Shore and Weiniger consider that an ordinary meaning analysis fails to take the interpretative process far and that ‘[i]t may simply result in an

²⁶⁰ *Siemens (Jurisdiction)*, at para. 92. See also *Plama (Jurisdiction)*, at paras. 147 and 190; and *Eureko*, at para. 186.

²⁶¹ *Saluka (Award)*, at para. 462 (*Black’s Law Dictionary*); *MTD (Award)*, at para. 113 (*Concise Oxford Dictionary of Current English*); *Tokios (Jurisdiction)*, at paras. 29 and 75 (*The New Shorter Oxford English Dictionary*); *ADF (Award)*, at para. 161 (*Webster’s New Twentieth Century Dictionary of the English Language*); *ADF (Order No. 2)*, at para. 20 (*Black’s Law Dictionary*); *Pope & Talbot (Merits, Phase 2)*, at para. 75, n. 67 (*Webster’s Third New International Dictionary*); *Feldman (Award)*, para. 96 (*Webster’s New Collegiate Dictionary*); *Lauder*, at para. 221 (*Black’s Law Dictionary*); *American Manufacturing*, Arbitrator Golsong’s Separate Opinion, at 40, para. 12 (*Webster’s Third International Dictionary*); *Methanex (Partial Award)*, at paras. 135-6 (*American Heritage Dictionary*, *The Oxford English Dictionary* and *Funk & Wagnalls New Comprehensive International Dictionary of the English Language*); *SD Myers (Partial Award)*, at para. 285 (*The Oxford English Dictionary*); *Aguas del Tunari*, at paras. 227, 229, 231 and 232 (*The Encarta World English Dictionary*, *The Oxford English Dictionary*, *Webster’s On-Line Dictionary*, *Webster’s Third New International Dictionary*, *Meriam Webster’s International Dictionary*, and *Black’s Law Dictionary*). See also the reference to dictionaries to ascertain the ordinary meaning of ‘fair and equitable treatment’ in Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’, 70 *BYBIL* 99 (1999), at 102-3.

²⁶² *Methanex (Partial Award)*, at para. 135. See also *Aguas del Tunari*, at para. 227, in which dictionary meanings supported the arguments of both the claimant and the respondent.

exchange of synonyms.’²⁶³ This statement is particularly relevant for substantive provisions such as ‘fair and equitable treatment’ which (particularly given the jurisprudence that has developed around the term) do not produce an abundance of meaning if dictionary meanings are applied to those individual terms. The problem relates not to an issue of textual ambiguity but ascertaining the substantive content of the standard of protection that those terms afford to investors. Put differently, the substantive content is far greater than what is indicated by the ordinary meaning of the words utilised to identify the substantive provision. Zachary Douglas has perceptively observed that

Article 31(1) of the Vienna Convention on the Law of Treaties requires interpretation in accordance with the ‘ordinary meaning’ of the terms of the treaty. In relation to the substantive investment protection standards, there is rarely any linguistic ambiguity latent in their formulation, so this first principle of interpretation will rarely take the tribunal very far in its quest to interpret a concept like the ‘fair and equitable standard of treatment’. In other words, nothing is gained by resorting to dictionary definitions of ‘fair’ and ‘equitable’.²⁶⁴

137. Stephen Vasciannie has drawn attention to the interpretation of substantive provisions from another angle. He has written:

difficulties of interpretation may also arise from the fact that the words ‘fair and equitable treatment’, in their plain meaning, do not refer to an established body of law or to existing legal precedents; instead, the plain meaning approach presumes that, in each case, the question will be whether the foreign investor has been treated fairly and equitably, without reference to any technical understanding of the meaning of fair and equitable treatment.²⁶⁵

138. But more often than not (as Chapter V, Section B shows) tribunals will look to relevant past decisions to shine light on the meaning of substantive provisions. It is

²⁶³ McLachlan, Shore and Weiniger, *International Investment Law: Substantive Principles* (2007), at 221, para. 7.66.

²⁶⁴ See Douglas, *The International Law of Investment Claims* (2009), at 82, para. 143 (and see also para. 145).

²⁶⁵ Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’, 70 *BYBIL* 99 (1999), at 103-4 (footnotes omitted). See, e.g., *Genin*, at para. 367; *Lucchetti (Award)*, at para. 48; *Loewen (Award)*, at para. 128; and *Wena Hotels (Award)*, at para. 84. It could be said that substantive provisions identify certain areas of law, the content of which is elaborated by sources of law external to the treaty.

not the practice of treaty drafters to mention cases or bodies of case law in explicit terms in a treaty.

139. Relevant studies that have focused on the legal meaning of terms used in investment treaties may also provide a source of guidance in determining the ordinary meaning. In *Bayindir*, for example, the Tribunal made reference to a comparative study of BIT definitions of ‘investments’ contained in other BITs to confirm its interpretation of ‘investment’ in the BIT in dispute.²⁶⁶

140. Where more than one equally applicable ordinary meaning of a term exists, the ordinary meaning may be heavily dependent on the facts of a case. A helpful case on point is *Pope & Talbot (Merits, Phase 2)*. There, the tribunal interpreted the NAFTA Article 1102(1) and (2) words ‘like circumstances’ as follows:

It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of ‘like’ can have a range of meanings, from ‘similar’ all the way to ‘identical’. In other words, the application of the like circumstances will require evaluation of the entire fact setting surrounding, in this case, the genesis and application of the Regime.²⁶⁷

141. Not only may the ordinary meaning be dependent on the facts; it may vary depending on the subjective opinion and cultural background of the interpreter.²⁶⁸ But use of these subjective notions in determining the ordinary meaning must be avoided

²⁶⁶ *Bayindir*, at para. 113, citing Rubins, ‘The Notion of “Investment” in International Investment Arbitration’, in Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), p. 292.

²⁶⁷ *Pope & Talbot (Merits, Phase 2)*, at para. 75 (footnotes omitted). See also *Aguas del Tunari*, at para. 91 (referring to Schwarzenberger, ‘Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties’, 22 *Current Legal Problems* 205 (1969), at 219, in which that commentator observed that the word ‘meaning’ itself has at least sixteen different meanings).

In this regard, Sir Robert Jennings has noted that ‘[a] problem of interpretation arises when the meaning of a treaty is doubtful or controverted. Where the meaning is clear, the treaty should be applied according to its clear meaning’. This position was qualified with the following addition ‘[i]n practice, however, the process of interpretation is not easily thus confined. The classical theory that a text has only one correct meaning is unrealistic’. Jennings, ‘Treaties’, in Bedjaoui, *International Law: Achievements and Prospects* 135 (1991), at 144.

²⁶⁸ See, e.g., Waldock III in *YILC* (1964-II), at 57, para. 16 (‘subjective elements may enter into the determination of the natural and ordinary meaning of a text and lead to different opinions as to its clarity’).

to maintain the objectivity of the Vienna Convention Rules interpretation process. In other words, what is ordinary should not be what the interpreter thinks is ordinary. On the contrary, it should be assessed according to more generally accepted standards, and this perhaps explains why the use of dictionaries is so prevalent. The ordinary meaning may also be influenced by the professional backgrounds of the treaty drafters. In this regard, FIATs have taken into account that investment treaties have been drafted by professionals knowledgeable in diplomacy, law and commerce and it is from the perspectives of such persons that the ‘ordinary meaning’ of treaty terms should be derived. In *Aguas del Tunari*, for example, the tribunal remarked

the negotiators of the Netherlands-Bolivia BIT likely possessed a sophisticated knowledge of business and law. For such persons, the ordinary meaning of a word or phrase also includes the legal meanings given to such words or phrases.²⁶⁹

142. This accords with the general position in international law in which the context and the object and purpose of the treaty play a role to suggest that the line of inquiry is not to determine the ordinary meaning to an ordinary person. Rather it would be to ascertain the ordinary meaning to a person reasonably informed of the treaty’s subject area.²⁷⁰

143. Another question concerning the ordinary meaning is whether it should be assessed with regard to the meaning prevalent at the time of the dispute or the time the text was drafted. The issue is discussed in Chapter V, Section E.

²⁶⁹ *Aguas del Tunari*, at para. 231. A similar concern for the expertise of the drafters is also found in *Methanex*, in which the tribunal observed ‘[t]he drafting parties of NAFTA were fluent in GATT law and incorporated, in very precise ways, the term “like goods” and the GATT provisions relating to it when they wished to do so’. *Methanex (Final Award)*, at Part IV, Chapt. B, para. 30. In the same vein, the *Pope & Talbot (Damages)* tribunal observed in assessing the negotiation history of the NAFTA that the negotiators were sophisticated representatives of their governments who should have known the implications of failing to insert ‘customary’ before the term ‘international law’. *Pope & Talbot (Damages)*, at para. 46. In this regard, the words of Justice Frankfurter (albeit relating to the interpretation of domestic statutes) are expositive: ‘If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists’. Frankfurter, ‘Some Reflections on the Reading of Statutes’, 47 *Columbia Law Review* 527 (1947), at 536.

²⁷⁰ See, e.g., Gardiner, *Treaty Interpretation* (2008), at 173-174.

4. Context

a) International Law Practice

144. The third criterion of Article 31(1) requires an interpretation to take into account the context of the terms subject to interpretation. The terms of a treaty should not be interpreted as if they were contained in a vacuum. They draw meaning from other provisions in the treaty and other sources or materials outside the treaty. Judge Jessup's observation that '[w]ords are like those insects that take color from their surroundings' captures with elegance the influence that the context exerts over the text.²⁷¹

145. The scope of the 'context' referred to in Article 31(1) appears to be wide. It finds specific elaboration in Article 31(2) but this latter provision still does not purport to be exhaustive. Well before the Vienna Convention was drafted, the diverse range of elements that may constitute the context were helpfully itemized by Hudson into four general categories:

[the context] is not simply the particular sentence, or the particular paragraph in which the term to be construed occurs. It may be (1) a particular part of the instrument, or (2) the instrument as a whole, or (3) the versions of the text in different languages, or (4) the texts of several interrelated and interdependent instruments ...²⁷²

²⁷¹ This quote is taken from a letter by Philip Jessup to Myres McDougal, 1 November 1967, quoted in McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967), at xxviii. Sinclair encapsulated the essence of the criterion when he wrote: 'there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted'. Sinclair, *supra* note 6, at 121, referring to both Yasseen, *supra* note 194, at 26 and de Visscher, *Problèmes de l'interprétation judiciaire en droit international public* (1963), at 30.

²⁷² Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), at 646-7. Similarly, see *Air Transport Services Agreement Arbitration*, (US v. France) 38 ILR 182 (1963), at 229. A more restricted view is taken by Oppenheim, *supra* note 4, at 1273, n. 12 ('[t]he context is the treaty as a whole, not merely the sub-paragraph, Article, or section of the treaty in which the unclear term appears, unless the part of the treaty under consideration is self-contained'). See also Article 1(1) of the Institute of International Law 1956 Resolution on interpretation, 46 *AIDI* 364-5 (1956), which, among other criteria, required the terms of a treaty to 'be interpreted in their context *as a whole*' (emphasis added). Fitzmaurice also subscribed to the restrictive school of thought. He viewed the requirement to take into account the context not as 'a narrow and quasi literal interpretation of words, phrases or articles, taken in isolation, that is envisaged, but one related to the treaty as a whole.' Fitzmaurice, *supra* note 76, at 11. An analysis of the various ILC draft articles on this point shows a gradual shift from referring to

146. A more detailed exploration of international practice and case law identifies many other types of context. Under international law, the meaning of a treaty term has been influenced by a context that relates to:

- a) the order of words or sentences found proximate to that term;²⁷³
- b) other paragraphs of an article in which the disputed term is found;²⁷⁴
- c) the position of the article in the treaty;²⁷⁵
- d) the ‘letter and spirit’ of the article;²⁷⁶
- e) other articles of the treaty in which the disputed term is found;²⁷⁷
- f) the ‘role’ assigned to an article by a treaty;²⁷⁸

the ‘context of the treaty as a whole’ to wording that permits an even wider contextual scope: Waldock III, Article 70(1) a natural and ordinary meaning is to be ‘given to each term ... in its context in the treaty and in the context of the as a whole’, *YILC* (1964-II), at 55; the 1964 ILC Draft Article 69(1) the ordinary meaning is to be ‘given to each term ... [i]n the context of the treaty’, *YILC* (1964-II), at 199; and the 1966 ILC Draft Article 27(1) an ordinary meaning is to be ‘given to the terms of the treaty in their context’, *YILC* (1966-II), at 219. Compare *YILC* (1966-II), at 222, para. 12.

²⁷³ See, e.g., in the *Asylum* case, ICJ Reports 266 (1950), at p. 279 and *Minority Schools in Albania*, PCIJ Ser. A/B, No. 64 (1935), at 18. However, the sequence of paragraphs has also been considered as inconsequential. See *Peter Pázmány University* case, PCIJ, Ser. A/B, No. 61, p. 208 (1933), at 247 (‘[i]t appears difficult to attach such momentous consequences to the system of numbering employed—especially as that system may, according to the information given by the Parties, have been merely accidental’).

²⁷⁴ See, e.g., *Free Zones* case, PCIJ, Ser. A/B, No. 46 (1932), at 140 (‘it must not be overlooked that Article 435, both by reason of its position in the Treaty of Versailles and of its origin, forms a complete whole: it would therefore be impossible to interpret the second paragraph without regard to the first paragraph’); *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion, PCIJ, Ser. B, No. 12 (1925), at 21 (‘[e]ven if there were any possible doubt in regard to the meaning of the first two sub-paragraphs ... this would be dissipated by the terms of the third sub-paragraph’); *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Reports 57 (1948), at 64 (‘paragraph 2 is concerned only with the procedure for admission, while the preceding paragraph lays down the substantive law’).

²⁷⁵ See, e.g., *Free Zones* case, PCIJ, Ser. A/B, No. 46 (1932), at 140.

²⁷⁶ *The SS ‘Wimbledon’*, PCIJ, Ser. A, No. 1 (1923), at 23. *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Reports 57 (1948), at 64. It may well be argued that this relates more to the object and purpose criterion.

²⁷⁷ See, e.g., *Minority Schools in Albania*, PCIJ, Ser. A/B, No. 64 (1935), at 18; and *Certain Expenses of the United Nations*, ICJ Reports 151 (1962) at 161 as to other provisions of the UN Charter throwing light on the provision subject to interpretation.

- g) a consideration of the relevant treaty as a whole;²⁷⁹
- h) the title of the treaty;²⁸⁰
- i) other relevant treaties or instruments;²⁸¹
- j) diplomatic correspondence surrounding an agreement;²⁸²
- k) an entire legal system or framework of agreements;²⁸³ and

²⁷⁸ *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion, PCIJ, Ser. B, No. 12 (1925), at 23.

²⁷⁹ See, e.g., *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, PCIJ, Ser. B, Nos. 2 and 3 (1922), at 23; *Certain Expenses of the United Nations* case, ICJ Reports 151 (1962), at 162; *Competence of ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion, PCIJ, Ser. B, No. 13 (1926), at 18.

²⁸⁰ See, e.g., *Beagle Channel Arbitration*, (Argentina v. Chile) (1977) 52 ILR 93, at 131, para. 18. In contrast, the ICJ has held the fact that States have entered into an agreement entitled 'Treaty of Friendship' does not oblige the parties to abstain from acts that could be classified as unfriendly acts, except when such a limitation is explicit or necessarily implicit. See *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 14 (1986), at 136-37. As to headings within a treaty, it may be argued that these may be used to interpret the treaty. The UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), although not a treaty, serves as a good illustration of the point. Footnote 1 of that instrument notes that '[a]rticle headings are for reference purposes only and are not to be used for purposes of interpretation'. The note suggests that had it not been included, it would have been arguable that the headings could potentially have been used to interpret that document. Similar reasoning could be applied to treaties.

²⁸¹ See, e.g., *Fisheries case*, (UK v Iceland), Jurisdiction, ICJ Reports (1973), at 8, para. 13; *Treatment of Polish Nationals in Danzig*, Advisory Opinion, PCIJ, Ser. A/B, No. 44 (1932), at 40; *Case concerning the Rights of Nationals of the United States of America in Morocco*, ICJ Reports (1952), at 195; *Costa Rica Journalists Association case*, 1985, Advisory Opinion, Inter-Am. Court of Human Rights, 75 ILR 31, at 47-48; *Air Transport Services Agreement Arbitration* (US v France), 38 ILR 182 (1963), at 229. As to the interpretation of 'a treaty by reference to other treaties, the parties to which are partly or totally non-identical', Schwarzenberger, *International Law* (1957), Vol. 1, at 528 has commented:

[p]rima facie, any such interpretation runs counter to the rule on exclusiveness of treaty relations. By itself, the fact that any number of other States, or either of two contracting States in its relations with third States, have accepted limitations of their sovereignty which it would have been desirable to incorporate into the treaty to be interpreted, is irrelevant ... Ultimately, the justification of any such interpretation depends always on some evidence either of actual intention of parties to this effect or of necessary intendment of the treaty' (footnote omitted).

²⁸² See, e.g., *Western Sahara case*, Advisory Opinion, ICJ Reports 12 (1975), at 54, para. 120. See Thirlway, *supra* note 91, at 32, questioning the approach of the Court on the ground that diplomatic correspondence was referred to by the Court without any stated reason such as ambiguity in the treaty text or absurdity.

²⁸³ This view was taken by the ICJ in the *South West Africa* cases, where the majority of the Court appears to have considered the context to have included the full text of the Mandate for German South West Africa, coupled with the League of Nations Covenant, as well as the 'Mandates System'. ICJ

- l) relevant factual, historical, political, economic and social backgrounds.²⁸⁴

147. Despite the frequent reference to the context in international case law, it is typically not a criterion that is alone decisive in the interpretation of a treaty. Often, the criteria of ordinary meaning and context are fused and applied as one rule. In the *(Second) Admissions* case, for example, the ICJ observed that ‘the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur’.²⁸⁵

148. Notwithstanding the wide understandings of context referred to above, the text of Article 31(1) requires that an ordinary meaning ‘be given to the terms of the treaty in *their* context’ (emphasis added), which suggests that consideration be given to the context *of the terms* subject to interpretation, not the treaty as a whole.²⁸⁶ Thus, it is arguable that the wide range of contexts indicated in the above list shows that

Reports (1962), at 336. The ruling has been considered as corresponding with Article 31(3)(c) of the Vienna Convention. See Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 1 (1978), at 49. The decision has been subject to criticism. See Thirlway, *supra* note 91, at 40-41.

²⁸⁴ See, e.g., Separate Opinion of Judge Higgins in the *Oil Platforms* case, ICJ Reports 161 (2003), at 237, para. 48; *North Atlantic Coast Fisheries* case, (GB v US), Award of 7 Sept. 1910, Scott’s Hague Reports 141 (1916) at 162-63; *Customs Régime between Germany and Austria*, Advisory Opinion, PCIJ, Ser. A/B, No. 41, p. 37, at 42 (1931) and joint Dissenting Opinion, at 75-6. See also the several examples provided by Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), at 656-57, §574 (the PCIJ ‘must take account of the circumstances in which the parties acted if it would understand their purposes, and its construction of an instrument may very properly be influenced by factors of a political or social significance’); and the Harvard Research on International Law, reprinted in 29 *AJIL (Supplement)* 657 (1935), at 953 (‘[t]he treaty, in short, stands, therefore, as a related part of the general setting in which the parties acted, and that setting must be taken into account if the purpose which the treaty was intended to serve is to be fully comprehended and effectuated’).

²⁸⁵ *Competence of the General Assembly regarding Admission to the United Nations*, Advisory Opinion, ICJ Reports (1950), at 8.

²⁸⁶ This position is fully consistent with the ICJ’s Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports (1952), at 196 and 199 (‘the first duty of a tribunal which is called upon to interpret and apply the *provisions* of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which *they* occur’ (emphasis added)).

international court and tribunal practice is not strictly in conformity with the Vienna Convention Rules.²⁸⁷

b) FIAT Practice

149. FIAT awards and commentary, much like the corresponding international law practice, show that a diverse range of contexts have been used to interpret treaties. Interpretations of treaty terms by FIATs have been influenced by a context provided by

- 1) words or sentences found in close proximity to those terms;²⁸⁸
- 2) other sub-paragraphs within an article in which that term is found;²⁸⁹
- 3) other articles in the treaty;²⁹⁰
- 4) the use of an identical or similar term in other articles of the treaty;²⁹¹

²⁸⁷ Notwithstanding the words used in its own draft articles, the ILC commented that the ‘ordinary meaning of a term is not to be determined in the abstract but in the context *of the treaty* ...’. *YILC* (1966-II), at 221, para. 12 (emphasis added).

²⁸⁸ See, e.g., *Lucchetti (Annulment)*, at para. 80 (holding that the second sentence of Article 2 of the Peru-Chile BIT ‘must be read in its context, i.e., together with the first sentence of the same article’); *MINE (Annulment)*, at para. 4.06; *Fedax*, at para. 24; *Amco (Annulment)*, at para. 34; *SD Myers (Partial Award)*, at 262 (‘[t]he phrases ... *fair and equitable treatment* ... and ... *full protection and security* ... cannot be read in isolation. They must be read in conjunction with the introductory phrase ... *treatment in accordance with international law*’). In interpreting Article 25(2)(b) of the ICSID Convention, Schreuer has commented that ‘[i]t is possible but not likely that the word “nationality” used earlier on in the same sentence in a more general context has a different meaning. ... Unless there are convincing reasons to the contrary, it must be assumed that a word appearing twice in the same sentence has the same meaning in both instances’. Schreuer, *supra* note 5, at 278.

²⁸⁹ *Plama (Jurisdiction)*, at para. 191; *Tokios (Jurisdiction)*, at para. 30; *Siemens (Jurisdiction)*, at para. 85; *Methanex (Final Award)*, at Part IV, Chap. C, para. 14; and *Pope & Talbot (Merits, Phase 2)*, at para. 37.

²⁹⁰ *Klöckner (Annulment)*, 2 ICSID Reports 95, at 118, para. 58 and 120, at para. 62; *MINE (Annulment)*, 4 ICSID Reports 79, at 89, para. 5.13; *Lanco*, at para. 40; *Banro American Resources v Congo* at para. 19; *ADF (Award)*, at paras. 133 and 147; *El Paso*, at para. 81; *Methanex (Final Award)*, at Part IV, Chpt. B, paras. 30 *et seq.* and Part IV, Chap. C, para. 15; *Pope & Talbot (Merits, Phase 2)*, at paras. 37 and 117; *Fedax (Jurisdiction)*, at para. 33; *SD Myers (Partial Award)*, at para. 244; and *Continental Casualty (Jurisdiction)*, at paras. 78-79.

²⁹¹ *Loewen (Jurisdiction)* case, at para. 40 *et seq.* See also *ADF (Award)*, at paras. 164-165. In Dr. El Mahdi’s Dissenting Opinion in *SPP*, at 253, he took the view that the reference to ‘investment’ anywhere in the ICSID Convention should be accorded the same ‘significance’.

- 5) the tense used in various articles of the treaty;²⁹²
- 6) the definition of a term as providing the context for other terms in the same treaty;²⁹³
- 7) the location of the article in the treaty;²⁹⁴
- 8) a consideration of the treaty as a whole;²⁹⁵
- 9) usage of a term in the context of investor/state dispute resolution (as opposed to the ordinary meaning of that term);²⁹⁶
- 10) an overall evaluation of the system/structure of the treaty;²⁹⁷

²⁹² *Tecmed*, at para. 64.

²⁹³ See, e.g., *Aguas del Tunari*, at para. 242; *SGS v Philippines*, at para. 99, n. 31 and *Feldman (Jurisdiction)*, at para. 34.

²⁹⁴ *SGS v Pakistan*, at paras. 169-170 (holding that a clearly grouped section of articles related to substantive obligations and an article by reason of its placement outside that group, particularly after the dispute settlement provisions, was not considered a substantive obligation) and at 170, n. 176 (observing that '[w]e do not, of course, here suggest that the particular location by itself of a provision within the Treaty affords anything like conclusive indication of the specific intent of the Contracting Parties. We are saying that the interpretation urged by the Claimant raises questions as to the coherence of the structuring of the BIT'); *SGS v Philippines*, at para. 124 (holding that although location is a factor entitled to some weight, it was not decisive); *Plama (Jurisdiction)*, para. 192 (finding that the positioning of the MFN clause in the provisions relating to substantive investment protection may influence the interpretation of the MFN provision but 'the context alone, in the light of the other elements of interpretation considered [in the award], does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise'); and *Eureko*, at para. 259. See also *Salini v Jordan (Jurisdiction)*, at para. 77; and *Lanco*, at para. 27.

An interesting counterpoint in this regard is one of the suggested means to interpret Justinian's *Corpus Juris*. As an example, the eminent Roman law scholar H. F. Jolowicz has written:

[the text's] position in the compilation may be decisive. If for instance two passages are contradictory, we should prefer one that comes from the title devoted to the subject in question (the *sedes materiae*) to one that occurs elsewhere (a *lex fugitiva*), for we must imagine that when he accepted the former, the legislator's mind was more specifically directed to the point at issue.

Jolowicz, *Roman Foundations of Modern Law* (1957), at 2 (footnotes omitted).

²⁹⁵ See, e.g., *Loewen (Award)*, at para. 233; *ADF (Award)*, at 149 ('the specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of NAFTA if a treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck by the three sovereign Parties'); *Methanex (Partial Award)*, at para. 98; and *Tokios (Jurisdiction)*, at para. 85 (indicating that under the Vienna Convention, 'the ordinary meaning of these terms "must emerge in the context of the treaty as a whole and in the light of its objects and purposes."'), citing Ian Brownlie, *Principles of International Law* 634 (5th ed. 1998).

²⁹⁶ *Tokios (Award)*, at para. 117.

- 11) the title of the treaty;²⁹⁸
- 12) the sub-heading under which the disputed provision is located;²⁹⁹
- 13) other relevant treaties or instruments;³⁰⁰
- 14) the length of the treaty;³⁰¹
- 15) the ‘legal context’ of the treaty;³⁰²
- 16) a treaty’s ‘circumstances’ or ‘background’;³⁰³

²⁹⁷ *Amco (Annulment)*, at para. 21; and *ADF (Award)*, at para. 149. See also *Klöckner (Annulment)*, at para. 119.

²⁹⁸ *Plama (Jurisdiction)*, at para. 193 (referring to the title of the BIT in dispute in ascertaining the object and purpose of that treaty); and Professor Brownlie’s Separate Opinion in *CME (Final Award)*, para. 17. In *Siemens (Jurisdiction)*, at para. 81, the tribunal noted that it ‘shall be guided by the purpose of the Treaty as expressed in its title and preamble’. However, at para. 92, that tribunal held that while the title included ‘investments’ and not ‘investors’, to exclude ‘investors’ from the treaty’s protections would not accord with its purpose.

²⁹⁹ *Plama (Jurisdiction)*, at para. 147; and *Salini v Jordan (Jurisdiction)*, at para. 76

³⁰⁰ See Chapter V, Section C.

³⁰¹ In *Occidental Exploration (Award)*, at para. 68, the tribunal hinted that provisions in treaties that were short in length may have a certain degree of additional weight or importance (as compared to lengthy treaties consisting of numerous articles) in assessing the intentions of the parties. Contrast this approach with the interpretation of a large and complex treaty such as the NAFTA, which comprises several different chapters dealing with a diverse range of subjects and in which certain provisions may only apply to a limited number of other provisions. See, e.g., *SD Myers (Partial Award)*, at para. 76.

³⁰² In *SD Myers*, for example, the tribunal stated that the legal context of Article 1102 of the NAFTA provision included other provisions of the NAFTA, its companion agreement—the North American Agreement on Environmental Co-operation—and principles that are affirmed in that environmental treaty, including those of the Rio Declaration. *SD Myers (Partial Award)*, at para. 247. The *SD Myers* tribunal further added that the interpretation of the phrase ‘like circumstances’ in Article 1102

must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. *SD Myers (Partial Award)*, at para. 250

Jan Paulsson suggests that to understand fully the provisions of the Energy Charter Treaty, they must be read in light of related laws such as trade law, competition law, regional common market treaties and the framework for regulation of the energy industry. Paulsson, ‘Arbitration without Privity’, 10 *ICSID Review Foreign Investment Law Journal* 232 (1995), at 251.

³⁰³ *Aguas del Tunari*, at 241; and *Sempra Energy (Jurisdiction)*, at para. 145. In *Tradex (Jurisdiction)*, at 67, although the issue concerned the interpretation of an Albanian law that provided foreign investors recourse to ICSID arbitration, it is of interest to note the tribunal’s approach. The tribunal’s view there was that the interpretation of the dispute settlement mechanism under this law was required to take into

17) the entire background of a host State's disputes with the investor's State in the trade sector at issue;³⁰⁴

18) State treaty practice in relation to the specific issue in dispute;³⁰⁵

19) 'the whole body of state practice, treaties and judicial interpretations of that term in international law cases';³⁰⁶ and

20) information emanating from a State party to the treaty in dispute but not a party to the arbitration.³⁰⁷

150. The above list is broad in scope—and some of its items may be too broad to fall within the meaning of the term 'context' in Article 31(1). As Jan Paulsson crisply put it, '[t]he permissible context is *the context of the terms* of the treaty and *not the context of the treaty generally*'.³⁰⁸ Thus, like other international courts and tribunals, the use of 'context' by FIATs may not be in full conformity with that provision of the Vienna Convention.

account 'a context of progressive evolution' of Albanian investment laws. See also *SPP (Jurisdiction No. 2)*, at para. 107.

³⁰⁴ *Pope & Talbot (Merits, Phase 2)*, para. 77. See also *SD Myers (Partial Award)*, at para. 245.

³⁰⁵ *Mihaly (Award)*, at para. 58. In that award, in relation to the issue whether development costs constituted an investment within the meaning of the ICSID Convention David Suratgar took the view in his Individual Concurring Opinion, at para. 6, that

the Tribunal should have called for evidence of international legal and utility precedents and practice [and] evidence from the World Bank and the International Finance Corporation as well as from insurance agencies such as the Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC).

He added

[i]t does appear for example that investment insurance can be obtained for development costs. As for the World Bank practice attention should be paid to the guidelines set out in the World Bank's *Discussion Paper* of September 1999, *Submission and Evaluation of Proposals for Private Power Generation Projects in Developing Countries* where (at p.14) a full discussion is provided with respect to the correct make-up of proper Capacity Payments.

Ibid.

³⁰⁶ *SD Myers (Partial Award)*, at para. 280.

³⁰⁷ In *Aguas del Tunari*, the tribunal, acting under Rule 34 of the ICSID Arbitration Rules requested information from the Government of the Netherlands as to the interpretation of the Netherlands-Bolivia BIT in dispute.

³⁰⁸ *Hrvatska*, Separate Opinion, at para. 44 (emphasis original).

151. Nonetheless, not every circumstance has been considered part of a context for the purposes of interpretation. For example, national legislation has been considered not to provide a context for the interpretation of a treaty.³⁰⁹ More particularly, the tribunal in *Aguas del Tunari* expressed caution in using a State's regulation of domestic corporate activity as a context by which similar terms occurring in foreign investment protection treaties could be interpreted. The tribunal took the view that it was 'perilous to transfer meaning from one regulatory framework to another where the motivations underlying the choice of terminology often will be determinative'.³¹⁰

152. The conflation of the ordinary meaning and context into one step of the interpretative process, as was noted in the international law section above, is also a practice common to FIATs. This practice is readily apparent in *Plama*, in which the tribunal searched for the 'ordinary contextual meaning' of the words subject to interpretation.³¹¹

153. Additionally, the context is a nebulous concept that may conceivably overlap with other criteria in the Vienna Convention Rules. For example, in *Eureko*, the tribunal considered that '[t]he context of Article 3.5 [of the Netherlands-Poland BIT] is a Treaty whose object and purpose is the "encouragement and reciprocal protection of investment"'.³¹²

³⁰⁹ See, e.g., *LESI (Award)*, at Pt. II, para. 24(iii) ('the Bilateral Agreement is an international treaty, its meaning should be the one given it by both parties, as opposed to a meaning based on one party's domestic legislation'). But compare these approaches to that taken in *AAP*, at para. 21 (taking the view that the BIT in dispute needs 'to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature').

³¹⁰ *Aguas del Tunari*, at para. 235, n. 214. See also *Tokios (Jurisdiction)*, Prosper Weil Dissenting Opinion, at para. 24 ('[w]hen it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players').

³¹¹ *Plama (Jurisdiction)*, at para. 147.

³¹² *Eureko*, at para. 248. See also *Pope & Talbot (Merits, Phase 2)*, at para. 77 (agreeing with the investor's submission 'that the legal context of Article 1102 [of the NAFTA] includes "the trade and investment-liberalizing objectives of the NAFTA"'). Under a broad view of the context, it could be

154. In contrast to the wide use of the context criterion, a few FIATs have held that some provisions may be sufficiently independent to stand alone without influence from the context provided by the other provisions in the treaty. As an example, the claimant in *Salini v Jordan* argued that other provisions of the BIT at issue influenced the meaning of the umbrella clause in dispute. The tribunal disagreed and held that these provisions did not affect the meaning of the umbrella clause.³¹³ Canada asserted in *SD Myers* that the compensation standard for expropriation set out in Article 1110(2) applied to other non-expropriation types of breaches of Chapter 11. The tribunal, however, doubted that Article 1110(2) supplied the standard for other Chapter 11 breaches:

The drafters of the NAFTA did not state that the ‘fair market value of the asset’ formula applies to all breaches of Chapter 11. They expressly attached it to expropriations.³¹⁴

understood as covering subsequent practice or international law rules referred to in Article 31(3) and even elements of the preparatory work dealt with in Article 32. For example, in relation to the rules of international law mentioned in Article 31(3)(c), Sinclair, *supra* note 6, at 139, has pointed out ‘[e]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary’. Also in discussing the reference to the circumstances surrounding the conclusion of a treaty in (what was to become) Article 32 of the Vienna Convention, Sir Humphrey Waldock in his Third Report as ILC Special Rapporteur on the law of treaties commented ‘[t]his broad phrase is intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded’. *YILC* (1964-II), at 59, para. 22, citing *European Commission of the Danube*, PCIJ Ser. B. No. 14, p. 57 (1927). In this regard, however, Professor Brownlie’s Separate Opinion in *CME (Final Award)*, at para. 9, should be noted. There he attempted to draw a distinction between the context in Article 31(1) and an interpreter’s ability to take into account rules of international law in Article 31(3)(c). In his view, ‘the context is that of the particular treaty and not of the principles of general international law’.

³¹³ *Salini v Jordan (Jurisdiction)*, at paras. 128-30. In *Gruslin*, the tribunal was required to interpret the terms of an Intergovernmental Agreement (‘IGA’) of 1979 between Malaysia and the Belgo-Luxemburg Economic Union. The claimant there argued that in some provisions of the IGA the noun ‘investment’ was qualified by the phrase ‘in the territory’ whereas in other parts, no such qualification was made. He asserted that Article 10(1), in which the term ‘investment’ was not so qualified and, consequently, for the purposes of Article 25 of the ICSID Convention, ‘investment’ in that provision applied without any territorial limit. *Gruslin*, at para. 13.7. In response, the tribunal concluded:

The absence of qualifying words of limitation to the word ‘investment’ in Article 10 itself does not broaden the class of investments included by the IGA. It follows that in providing for the resolution of disputes within the ICSID Convention, Article 10 is limited to the same subject matter as the rest of the IGA, namely to investments by nationals of one contracting party in the territory of the other.

Gruslin, at para. 13.10.

³¹⁴ *SD Myers (Partial Award)*, at para. 76. See also, Article 300 of the NAFTA, which prescribes that Chapter 3, including its definitions, applies (unless provided otherwise) only to Part Two of the NAFTA.

155. Silence as to matters falling within the specific subject area of a treaty may also constitute a part of the context. The tribunal in *Salini v Jordan* succinctly drew attention to the multifaceted problems that silence in a treaty throws up when it observed ‘silence may mean agreement or disagreement. It also may mean that no conclusion should be drawn from silence’³¹⁵ and that the consequences to be drawn from silence ‘may be different in each case, taking into account the circumstances of the case’.³¹⁶ The split personality of silence is well illustrated in the *Methanex* tribunal’s observation concerning the absence of a reference to *amicus* submissions in NAFTA Chapter 11: ‘there is no provision in Chapter 11 that expressly prohibits the acceptance of *amicus* submissions, but likewise nothing that expressly encourages them’.³¹⁷ It can be seen that the interpretation of silence is thus a difficult task, often fraught with considerable uncertainty.

156. One means used by FIATs to make sense of silence is to have regard to similar treaties. Thus in *Tokios*, the absence of a qualification to an investment treaty provision, which qualification had been included in other investment treaties, was seen ‘as a deliberate choice of the Contracting Parties’ not to impose limits on the provision.³¹⁸ FIATs have also looked to other treaties for insights into other language

³¹⁵ *Salini v Jordan (Award)*, at para. 95.

³¹⁶ *Salini v Jordan (Award)*, at para. 96.

³¹⁷ *Methanex (Amicus Decision)*, at para. 38.

³¹⁸ *Tokios (Jurisdiction)*, at para. 36. See also *SGS v Philippines*, at para. 132(e). Words included in one treaty but not present in similar treaties concluded by the same State may be seen to create a presumption that the provisions were intentionally omitted and that this comparative exercise raises questions as to whether these words should be implied. See, e.g., the submission made by Argentina in *Sempra Energy (Jurisdiction)*:

the relevant interpretation ... is that which arises from the intention of the State expressed in the provisions of some treaties and omitted from the provisions of other treaties signed by the same State; this comparative exercise makes it possible to establish the value of silence vis-à-vis that of words, arguing that if a treaty includes a certain provision but a subsequent or simultaneous treaty does not, this constitutes a presumption that the recognition of the rights concerned is not intended ...

Ibid., at para. 136 (tribunal’s summary of Argentina’s submission). This point is discussed in Chapter V, Section C below. If terms are to be implied that have not been explicitly included in the treaty, it is important to have a degree of certainty that the omission was unintentional. In *CAA-Vivendi (Challenge)* the *ad hoc* Committee was faced with a challenge to one of its members. However, the ICSID Convention did not contain rules governing such a situation. The *ad hoc* Committee approach was to apply not the ICSID Convention but ICSID Rules 8-12 to the challenge. On this point,

that could have been employed in the disputed treaty but was not.³¹⁹ In contrast, it has been suggested that where a treaty is silent as to whether a FIAT can take measures to protect parties, such as requiring the payment of costs to be guaranteed, this silence cannot by itself mean that the tribunal prevented from making such measures.³²⁰

157. The gap left by the silence may also be filled in by the treaty's object and purpose, as was the case in *Siemens*.³²¹ At other times, relevant rules of international law not mentioned in the treaty may add substance to the silence. For example, in *Loewen (Jurisdiction)*, the tribunal made the following observation:

We accept that an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (Elsi) (United States v Italy)* (1989) ICJ 15 at 42). Such an intention may, however, be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.³²²

Schreuer, *supra* note 5, at 1042, has remarked that this decision is possible only on the assumption that the omission of these provisions from the ICSID Convention was unintentional and that if the omission was deliberate, they could not be reintroduced under the guise of the ICSID Rules.

³¹⁹ For example, the *Plama* tribunal noted that if the Respondent's interpretation of the ECT were correct 'it is surprising that Article 17(1) should be drafted as it is: it would have been much easier to draft wording to make the Respondent's meaning plain'. *Plama (Jurisdiction)*, at para. 156. The tribunal referred to Article VI of the ASEAN Framework Agreement on Services, December 1995, as an example of the words that could have been drafted, but were not. See also *Plama (Jurisdiction)*, at para. 156 ('[i]t requires little effort to imagine other similarly effective language which could have been used for Article 17(1) ECT—but which has not there been used. In these circumstances, it would clearly not be permissible for the Tribunal to re-write Article 17(1) ECT in the Respondent's favor') and also at para. 148; *Tokios (Jurisdiction)*, at para. 36; and *Olguin (Jurisdiction)*, at paras. 72-73. In *Agua del Tunari*, at para. 234, the tribunal, without reference to other treaties, suggested wording it considered would have been used (as opposed to the words actually used) had the parties intended a certain meaning. On this point see also *SGS v Pakistan*, at para. 171.

³²⁰ *Casado*, at paras. 85-6; and *Siemens (Jurisdiction)*, at para. 140. Judge Fitzmaurice was sceptical about such reasoning. In the *Golder* case, he described as a 'logical fallacy' the situation under which B would derive from A 'because A does not in terms exclude B. But non-exclusion is not *ipso facto* inclusion. The latter still remains to be demonstrated'. The *Golder* case, European Court of Human Rights, 57 ILR (1975), at 249.

³²¹ *Siemens (Jurisdiction)*, at para. 140.

³²² *Loewen (Jurisdiction)*, at para. 73. An almost identical finding is made in *Loewen (Award)*, at para. 160, which finding was approved in *SGS v Pakistan*, at para. 171, n. 178. See also *Loewen (Award)*, at para. 162 in which the tribunal was willing to imply a role of 'judicial finality' not expressly included in the NAFTA treaty and para. 226 ('[i]t is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity'). This point overlaps with Article 31(3)(c) discussed at Chapter III, Section D.

158. FIATs also appear reluctant to use silence in a treaty to read in limitations neither found in the text nor evident from the negotiating history.³²³

159. The award in *Gruslin* demonstrates that the context provided by the formatting or visual appearance of a treaty text was the subject of dispute. For present purposes, the relevant provision was Article 1(3) of the 1979 Intergovernmental Agreement between Malaysia and the Belgo-Luxembourg Economic Union. The text's original layout was as follows³²⁴:

(3) The term "investment" shall comprise every kind of assets and more particularly, though not exclusively:—

- (a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens, pledges, usufructs and similar rights;
- (b) shares and other types of holding;
- (c) titles to money or to any performance having an economic value;
- (d) copyrights, industrial property rights (such as patents for inventions, trademarks, industrial designs), know-how, trade names and goodwill; and
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources.

provided that such assets when invested:—

- (i) in Malaysia, are invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon;
- (ii) in the Belgo-Luxembourg Economic Union, are invested under the relevant laws and regulations.

Any alteration of the form in which assets are invested shall not affect their classification as investment, provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested.

160. The format of Article 1(3), as it was printed in the executed treaty, justifies its sub-paragraphs (a) through (e) to the left-hand margin. Immediately below sub-paragraph (e) were indented provisos (i) and (ii), which gave the appearance (resulting from the visual perception created by the indentation) that they were connected exclusively with sub-paragraph (e) and not with (a) through (d). In the *Gruslin* tribunal's view

³²³ See, e.g., *Tokios (Jurisdiction)*, at para. 52.

³²⁴ This text has been scanned from the *Gruslin* award as reprinted in 5 ICSID Reports at 488. It is assumed that the editors of the ICSID Reports have retained all formatting and indents used in the original award. The text appears in the award at para. 9.2.

[i]t is obvious that proviso (i) should have been justified back to the margin, immediately under para (e), rather than aligned to its text. It is untenable to suggest that because the proviso is indented in from the margin, it is to be read as attaching only to para (e). Proviso (i) sensibly is to be read as attaching to any asset coming from within the term of ‘investment’, including any of the paras (a) to (e).³²⁵

161. *Gruslin* thus indicates that the context provided by the formatting or visual appearance of a treaty’s text does not appear to exert considerable influence on an interpretation, particularly when the substance of the text indicates this layout is misleading.

162. Another case raising issues as to the context provided by the format of treaty provisions is *American Manufacturing*. There, the tribunal considered such a context as being less important than the object and purpose of the treaty. The tribunal held that

the manner in which Article IX of the [Zaire-US BIT] is formatted could mislead any reader and could entail an interpretation not in conformity with the object and purpose of the provisions in question. Such an interpretation would lead to an absurd result and an unacceptable fact.³²⁶

163. On the subject of a treaty’s context, some particularities of the NAFTA require comment. This treaty is one of the most complex free trade agreements in existence. It covers a great deal more than foreign investment, consisting of 22 Chapters that include provisions regulating customs procedures, intellectual property and market access for goods and services. Virtually all Chapters contain their own articles that set out definitions of terms; some chapters stand alone; others contain general principles and rules that run through much of the treaty text; several provisions provide exceptions; and five schedules list non-conforming measures that are not subject to the legal framework of the NAFTA.³²⁷ Mindful of these complexities, the tribunal in *ADF v United States* stated

³²⁵ *Gruslin*, at para. 22.1.

³²⁶ *American Manufacturing (Award)*, at para. 5.36.

³²⁷ See *ADF (Award)*, at para. 148.

the specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of NAFTA if a treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck by the three sovereign Parties.³²⁸

164. But as will be seen shortly, this statement is not useful when a conflict emerges between provisions in its different Chapters. Such a conflict surfaced in *SD Myers*. In that case, Canada contended that while the export ban at issue may have contravened NAFTA Chapter 11, such bans could be permitted under Chapter 3 (concerning goods) if driven by proper environmental concerns. The tribunal considered that the Chapters of the NAFTA were part of a ‘single undertaking’ and that generally its provisions were ‘cumulative’ and ‘complementary’.³²⁹ It proceeded to adopt the position that while different Chapters of NAFTA overlap, it saw no reason why a measure concerning goods under Chapter 3 could not constitute a measure relating to investors or investments under Chapter 11. It noted, however, after a discussion of relevant WTO case law, that ‘different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict’.³³⁰

165. In a later phase of the proceedings, the *SD Myers* tribunal provided the following elaboration on what it termed the ‘cumulative principle’:

The grant of a right generally does not take away other rights unless they are mutually exclusive, or the grant is stated expressly to abrogate another right.

... The cumulative principle does not apply where there is actual conflict between different provisions.³³¹

166. It went on to note:

General principles such as the cumulative principle must yield to specific treaty provisions to the contrary. An example in the context of Chapter 11 is in Article 1102,

³²⁸ At para. 149, citing, *inter alia*, Articles 31 and 32 of the Vienna Convention.

³²⁹ At paras. 291-2, quoting with approval the WTO case of *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/396/R, at para. 738.

³³⁰ *SD Myers (Partial Award)*, at para. 294.

³³¹ *SD Myers (Compensation)*, at paras. 132-133.

which expressly excludes from the scope of the chapter measures that are *covered by Chapter 14 (financial services)*. An investor in financial services generally could not bring a Chapter 11 claim. Chapter 11 does not contain a similar exclusion of activities that engage Chapter 12.

... SDMI has acquired no extra rights in this case because of the existence of Chapter 12, but neither has it lost any. The Chapter 11 rights of SDMI are no stronger or weaker merely because there is another section of the NAFTA that provides some additional constraints on the way a state treats nationals of another NAFTA state.

... In summary, the fact that SDMI as a cross-border service provider may have recourse to the dispute provisions of Chapter 12, does not deprive it of the right to claim as an investor under Chapter 11. Extending to it rights as a cross-border service provider under Chapter 12 does not take away from SDMI rights conferred on it by Chapter 11.³³²

167. In concluding this section, it must be noted that the Fauchald empirical analysis found that contextual arguments are used by ICSID tribunals frequently and that out of the 98 decisions reviewed, contextual arguments in 38 decisions were ‘essential’ interpretative arguments (defined as those arguments ‘that constitute an important factor in the subsequent analysis’).³³³ Despite the frequency of its use, a general conclusion that may be drawn from the foregoing Section is that the context alone is usually not determinative of an interpretation.³³⁴

5. *Object and Purpose*

a) *International Law Practice*

168. The fourth and final Article 31(1) criterion is the object and purpose of the treaty. This term adds a teleological element to the Vienna Convention interpretative process.³³⁵ On the face of its wording, this criterion is comprised of two elements: (1) the object and (2) the purpose. Nonetheless, in virtually all cases, the ‘object and purpose’ has been employed as a unitary concept rather than as two terms having

³³² *SD Myers (Compensation)*, at paras. 134-5 and 138.

³³³ Fauchald, *supra* note 11, at 321.

³³⁴ See, e.g., *Plama (Jurisdiction)*, at para. 192 (‘the context alone, in the light of the other elements of interpretation considered [in the award], does not persuade the Tribunal that the parties intended such an interpretation’); and *Salini v Jordan (Jurisdiction)*, at para. 77 (holding that ‘the context cannot prevail over the general wording of the text’). See also Fauchald, *supra* note 11, at 321 (concluding in relation to essential contextual arguments that they were ‘not necessarily in support of the final conclusion.’).

³³⁵ It has been described by Yasseen as the ‘*ratio legis du traité*’. Yasseen, *supra* note 194, at 55.

distinct functions.³³⁶ Where treaty interpretations make reference only to the object or to the purpose, either tends to be used synonymously with the phrase ‘object and purpose’.

169. An appreciable distinction between the terms ‘object’ and ‘purpose’ is difficult to find in the English language. For example, *The New Shorter Oxford English Dictionary* defines ‘object’ as ‘[t]he end to which effort is directed; a thing sought or aimed at; a purpose, an end, an aim’. In the same dictionary a meaning ascribed to the noun ‘purpose’ is ‘[a] thing to be done; an object to be attained, an intention, an aim ... [t]he reason for which something is done or made, or for which it exists; the result or effect intended’. The circularity inherent in these two definitions eliminates, to a large extent, the differences that those words may possess and explains the failure of English speakers to differentiate between the two terms.³³⁷

170. The distinction, however, appears to be clearer in the French language. In this regard, the French version of Article 31(1) of the Vienna Convention speaks of ‘à la lumière de son objet et de son but’. Yasseen has observed:

... En droit interne, il convient de le rappeler, chacun de ces deux termes a un sens précis. Il devrait en être ainsi en droit international. L’objet du traité est ce que les parties ont fait, les norms qu’elles ont énoncées, les droits et les obligations qui en découlent, tandis que le but du traité est ce que les parties on voulu atteindre. ...

... Certains auteurs sont pourtant d’avis que la jurisprudence international envisage les deux termes *objet* et *but* comme synonymes. Or il nous semble plus exact de dire que, dans le domaine de l’interprétation des traités, la jurisprudence a tendance plutôt à employer le terme *objet* dans le sens du terme *but*. ...

171. Another way of explaining the difference would be to say that ‘l’objet d’une acte’ is the direct and immediate consequence of the performance of an act (e.g.,

³³⁶ For a separate treatment of the two terms see the Advisory Opinion on *Minority Schools in Albania*, PCIJ Ser. A/B, No. 64, p. 17.

³³⁷ See also the eighth edition of *Black’s Law Dictionary*, which defines one sense of the noun ‘object’ as ‘[s]omething sought to be attained or accomplished; an end, goal or *purpose*’ (emphasis added); and the phrase ‘object of a statute’ as ‘[t]he aim or *purpose* of legislation; the end or design that a statute is meant to accomplish’ (emphasis added). The same dictionary defines the noun ‘purpose’ as ‘[a]n objective, goal or end’.

creating a treaty with rights and obligations), whereas ‘le but d’une acte’ is the result achieved through ‘l’objet’.³³⁸

172. Some commentators consider that the object and purpose criterion is subordinate to the ordinary meaning.³³⁹ For example, Sinclair has noted that

[i]t may of course be that the intellectual process can be short-circuited where the object or purpose of the treaty is so overwhelmingly apparent that it must necessarily and from the very outset exercise a determining influence upon the search for the contextual ‘ordinary meaning’; but this is likely to be a rare case, given that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.³⁴⁰

173. Gardiner’s view is that the object and purpose of a treaty is limited to ‘a means of shedding light on the ordinary meaning’ and that the function of this criterion ‘is not one allowing the general purpose of a treaty to override its text.’³⁴¹

174. In contrast, the European Court of Human Rights has sometimes applied expansive teleological techniques in interpreting the European Convention on Human Rights. In the *Tyrer* case, it held as follows:

The Court must also recall that the [European Convention on Human Rights] is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.³⁴²

175. The European Court of Justice has also taken a relatively wide teleological approach, which has caused Lord Diplock to observe that the Court

³³⁸ See Linderfalk, *On the Interpretation of Treaties: Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), at 207; and Buffard and Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’, 3 *Austrian Review of International and European Law* 311 (1998), at 325-328.

³³⁹ Nonetheless, the criterion finds many important roles in the Vienna Convention. See, e.g., Article 33(4) of the Vienna Convention requires it to be the determinative factor in the event of a difference in meaning of authentic treaty texts that cannot be removed by application of Articles 31 and 32. See also, the reference to the criterion in Articles 18, 19, 20, 33, 41, 58 and 60 of the Vienna Convention.

³⁴⁰ Sinclair, *supra* note 6, at 130.

³⁴¹ Gardiner, *Treaty Interpretation* (2008), at 190.

³⁴² ECHR, Series A, No. 26, p. 15 (1978), para. 31.

seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth.³⁴³

176. While it is not uncommon for international law cases to have referred specifically to the ‘object and purpose’ of a treaty in their interpretations,³⁴⁴ other terminology is frequently used to convey, more or less, the same concept. Those other terms include a treaty’s:

- a) ‘aim’;³⁴⁵
- b) ‘aim and scope’;³⁴⁶
- c) ‘aim and object’;³⁴⁷
- d) ‘aim and purpose’;³⁴⁸
- e) ‘common and reasonable purpose’;³⁴⁹
- f) ‘known and proved purpose’;³⁵⁰
- g) ‘general plan’;³⁵¹
- h) ‘main object’;³⁵²

³⁴³ *Henn and Darby v Director of Public Prosecutions* [1981] AC 850, at 905.

³⁴⁴ See, e.g., *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 15 (1951), at 24.

³⁴⁵ *Factory at Chorzów*, (Merits) (1928), Judgment No. 13, PCIJ Series A, No. 17, p. 47; and *Norwegian Loans case*, ICJ Reports (1957), at 24.

³⁴⁶ *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion, PCIJ, Ser. B, No. 13 (1926), at 18.

³⁴⁷ *Greco-Bulgarian ‘Communities’*, Advisory Opinion, PCIJ, Ser. B, No. 17 (1930), at 21.

³⁴⁸ *McNair*, at 380.

³⁴⁹ *Italian Republic v Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, 29 ILR 442 (1959), at 460; and *Kingdom of Greece (on behalf of Apostolidis) v. Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, 34 ILR 219 (1960), at 241.

³⁵⁰ Opinion of the US Members, *Alaska Boundary case*, 1903 (GB v US), 15 RIAA 485, at 528.

³⁵¹ *Diversion of Water from the Meuse*, PCIJ, Judgment, Ser. A/B, No. 70 (1937), at 32.

- i) ‘paramount object’;³⁵³
- j) ‘purpose’;³⁵⁴
- k) ‘general purpose’;³⁵⁵
- l) ‘object and its end’;³⁵⁶
- m) ‘general scheme’;³⁵⁷
- n) ‘underlying idea’;³⁵⁸ and
- o) the ‘main preoccupation of the authors’.³⁵⁹

177. Often, the object and purpose may be evident from the preamble of a treaty,³⁶⁰ sometimes guidance may be provided by the title of a treaty,³⁶¹ and, on occasion, it

³⁵² *German Settlers in Poland*, Advisory Opinion, PCIJ, Ser. B, No. 6 (1923), at 25.

³⁵³ *Temple of Preah Vihear*, ICJ Reports 6 (1962), at 34-5.

³⁵⁴ *Rights of Minorities in Upper Silesia*, Judgment, PCIJ, Ser. A, No. 15 (1928), at 33.

³⁵⁵ *Greco-Bulgarian ‘Communities’*, Advisory Opinion, PCIJ, Ser. B, No. 17 (1930), at 20; and *Constitution of the Maritime Safety Committee of IMOC*, Advisory Opinion, ICJ Reports (1960), at 170. See also, the Harvard Research on International Law, reprinted in 29 *AJIL (Supplement)* 657 (1935), at Article 19.

³⁵⁶ *Re Competence of Conciliation Commission*, Anglo-Italian Conciliation Commission, 22 ILR 867 (1955), at 871.

³⁵⁷ *Interpretation of the Statute of the Memel Territory*, PCIJ, Ser. A/B, No. 49 (1932), at 317; and *Aerial Incident of 27 July 1955*, Preliminary Objections, Judgment, ICJ Reports 127 (1959), at 142.

³⁵⁸ *Minority Schools in Albania*, Advisory Opinion, PCIJ, Ser. A/B, No. 64 (1935), at 17.

³⁵⁹ *Interpretation of the Convention of 1919 Concerning Employment of Women at Night*, PCIJ, Ser. A/B, No. 50 (1932), at 374.

³⁶⁰ As Fitzmaurice put it

[a]lthough the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, any express or explicit general statement of the treaty’s objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.

Fitzmaurice, *supra* note 185, at 228. See also the Dissenting Opinion of Judge Weeramantry in *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, ICJ Reports 53 (1991), at 67; and Yasseen, *supra* note 194, at 35 (‘C’est le préambule qui souvent énonce l’objet et le but du traité...’). But see Gardiner, *Treaty Interpretation* (2008), at 192 and 196-197 (while it is common to use the preamble as a source of guidance for understanding a treaty’s object and purpose, to keep within the Vienna Convention Rules, it is the whole text and not simply the preamble that needs to be taken into account and that while the ‘preamble may seem an obvious starting point for ascertaining the object and purpose of the treaty, caution is necessary because preambles are not always drafted with care and a preamble itself may need interpreting’).

may be explicitly stated in the text of the treaty.³⁶² Subsequent practice may also assist in determining the object of a treaty.³⁶³ In many but not all respects, the criterion has similarities with the principle of effectiveness.³⁶⁴

b) FIAT Practice

178. A number of FIATs have made explicit reference to the ‘object and purpose’ of a treaty or a particular provision³⁶⁵ but many others have referred to a variety of similar terminology, including a treaty’s:

- a) ‘intention’;³⁶⁶
- b) ‘aim and spirit’;³⁶⁷
- c) ‘aim’;³⁶⁸
- d) ‘motive’;³⁶⁹
- e) ‘objective[s]’;³⁷⁰

³⁶¹ See *Case of Certain Norwegian Loans*, ICJ Reports (1957), at 24.

³⁶² See, e.g., Section 52(c) of the Agreement regarding the Headquarters of the IAEA (Austria-IAEA) 1957 (‘[t]his Agreement shall be construed in the light of its primary purpose of enabling the IAEA at its headquarters in the Republic of Austria full and efficiently to discharge its responsibilities and fulfil its purposes’).

³⁶³ *Case Concerning the Temple of Preah Vihear*, Merits, Judgment, ICJ Reports 6 (1962), at 35.

³⁶⁴ See Chapter V, Section F. See also *Kingdom of Greece (on behalf of Apostolidis) v. Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, 34 ILR 219 (1960), at 241.

³⁶⁵ See, e.g., *Plama (Jurisdiction)*, at paras. 147-9; *Tokios (Jurisdiction)*, at para. 32; *Maffezini (Jurisdiction)*, at 402, para. 31; *SGS v Pakistan*, at para. 165; *CAA-Vivendi (Challenge)*, at para. 11; *Noble Ventures (Award)*, at para. 50; *Lauder*, at para. 292; and *Vacuum Salt*, at 338, para. 29, n. 9. In respect of FIAT pronouncements regarding the similarities between the object and purpose criterion and the principle of effectiveness, see Chapter V, Section F.

³⁶⁶ *Kaiser Bauxite*, at para. 17.

³⁶⁷ *Amco (Jurisdiction)*, at para. 18.

³⁶⁸ *Pope & Talbot (Merits, Phase 2)*, at para. 116; *Amco (Jurisdiction)*, at para. 23; *Plama (Award)*, at para. 139.

³⁶⁹ *Aguas del Tunari*, at 241.

- f) objects;³⁷¹
- g) ‘purpose[s]’;³⁷²
- h) ‘purpose and aim’;³⁷³ and
- i) ‘general spirit and objectives’.³⁷⁴

179. According to some FIATs, the starting point of the search for a treaty’s object and purpose is the text of the treaty itself.³⁷⁵ This approach serves to reinforce the view that the text is the most important Article 31(1) criterion. Further confirmation of the primacy of the text is found in cases where reference is made to the object and purpose not to determine but to confirm an interpretation.³⁷⁶

180. A treaty’s preamble has also assisted FIATs to elucidate its object and purpose.³⁷⁷ The Fauchald empirical analysis found that of the 98 decisions reviewed,

³⁷⁰ *SD Myers (Partial Award)*, at para. 229; *ADF (Award)*, at para. 147; *Banro*, at para. 16; *LESI*, at Pt. II, para. 13; *CSOB (Jurisdiction)*, para. 57; *Klöckner (Annulment)*, at para. 119; *MTD (Award)*, at para. 104; and *Loewen (Jurisdiction)*, at para. 46.

³⁷¹ *Gruslin*, at 493, para. 13.7.

³⁷² *Santa Elena (Award)*, at 170, para. 64; *Siemens (Jurisdiction)*, at paras. 81, 92; *Wena Hotels (Jurisdiction)*, at 81 and 84; *Feldman (Jurisdiction)*, at para. 35; and *Aucoven (Jurisdiction)*, at para. 97.

³⁷³ *Banro*, at paras. 19 and 20.

³⁷⁴ *AAP*, at 270, para. 51.

³⁷⁵ See, e.g., *ADF (Award)*, at para. 147 ([t]he object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph). See also *Plama (Jurisdiction)*, at para. 161; *Tokios (Jurisdiction)*, at para. 32; and *SGS v Pakistan*, at para. 165. The Fauchald empirical analysis found that 12 out of the 48 decisions that used the object and purpose in their interpretative arguments referred to the provisions of the treaty to be interpreted. Fauchald, *supra* note 11, 322.

³⁷⁶ *Feldman (Jurisdiction)*, at para. 35.

³⁷⁷ See, e.g., *Tokios (Jurisdiction)*, at para. 31 and the Dissenting Opinion of Prosper Weil, at para. 19; *Gruslin*, at 493, para. 13.7; *Saluka (Award)*, at para. 299; *Siemens (Jurisdiction)*, at para. 81; *Metalclad (Award)*, at 225, para. 71; *Vacuum Salt*, at 345, para. 39; *Plama (Jurisdiction)*, at para. 193; *Amco (Jurisdiction)*, at paras. 23 and 249; *SGS v Philippines*, at para. 116; *Continental Casualty (Jurisdiction)*, at para. 80; and Professor Brownlie’s Separate Opinion in *CME (Final Award)*, para. 17. See also Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995), at 20 (observing that even though preambles rarely contain binding obligations, they may serve as ‘useful aids to interpretation of the treaty’). For a strong critique of the use of preambles in determining the object and purpose of the treaty, see Zachary Douglas, *The International Law of Investment Claims* (2009), at 82, paras. 146 *et seq.* He questions, for example, whether FIATs are mandated to promote policy-based preamble goals in resolving specific disputes between parties and whether FIATs have the capability to

48 used the object and purpose criterion in their interpretative arguments but in that smaller group only 13 decisions referred to the preamble as a source that identifies the treaty's object and purpose.³⁷⁸ This suggests a low rate of use of the preamble for interpretative purposes. Nonetheless, where it is used, FIATs have considered it a valuable source for casting light on the object and purpose. In this regard, the tribunal's opinion in *Aguas del Tunari* was that '[i]t is widely accepted that the preamble language of a treaty can be particularly helpful in ascertaining the motive, object and circumstances of a treaty'.³⁷⁹

181. Less frequently, light has been cast on the object and purpose by the title of a treaty;³⁸⁰ the preparatory work;³⁸¹ or, in the case of the ICSID Convention's interpretation, the Executive Director's Report.³⁸² The ECT is more straightforward in the sense that it has a specific provision (Article 2) entitled "Purpose of the Treaty". In addition to this provision, the ECT has an introductory note which expresses a 'fundamental aim' of the treaty ('to strengthen the rule of law on energy issues'). The tribunal in *Plama* considered that the ECT must be interpreted consistently with this aim.³⁸³

182. On a strict reading of Article 31(1), the object and purpose must be that of the treaty. The provision requires that an ordinary meaning is 'to be given to the terms of the treaty in their context and in the light of *its* object and purpose' (emphasis added).³⁸⁴ The use of 'its'—from a grammatical perspective—is a reference to the

assess whether their interpretation of substantive principles (influenced by the preamble) will in fact achieve the wide preambular goals such as greater economic cooperation.

³⁷⁸ Fauchald, *supra* note 11, at 322.

³⁷⁹ *Aguas del Tunari*, at para. 241, n. 216.

³⁸⁰ See, e.g., *Plama (Jurisdiction)*, at para. 193; *Continental Casualty (Jurisdiction)*, at para. 80 and *Saluka (Award)*, at para. 299. See, also note 298 *supra*. As to the international law position on this specific issue, see *Case of certain Norwegian Loans* case, Judgment, ICJ Reports (1957), at 24 ('[t]he purpose of the Convention in question is that indicated in its title').

³⁸¹ See, e.g., *Banro*, at para. 16.

³⁸² See, e.g., *Vacuum Salt*, at 345, para. 39; and *Tokios (Opinion)*, at paras. 2 and 19.

³⁸³ *Plama (Award)*, at para. 139.

³⁸⁴ See, e.g., *Plama (Jurisdiction)*, at paras. 117 and 160; and *Aguas del Tunari*, at para. 91. Both of these cases speak of examining the object and purpose of the *treaty*. See also Waldock III, Article

treaty rather than the terms.³⁸⁵ Nevertheless, many FIATs appear to emphasise the object and purpose not of the treaty as a whole but of a specific provision.³⁸⁶ There are sensible reasons for utilising the object and purpose of a provision. For example, in interpreting a treaty as complex and voluminous as NAFTA, it is understandable that the tribunal may desire to assess solely the object and purpose of a single provision or one of its Chapters—other provisions may have distinct objectives that may not be evident if the object and purpose of the whole treaty is considered.³⁸⁷ Fauchald's empirical analysis found that of the 98 ICSID decisions examined 37, 16, 3 and 2 decisions relied on, respectively, the object and purpose of the treaty, a specific provision of the treaty, a selection of the treaty's provisions and a chapter of the treaty.³⁸⁸

183. FIATs frequently tend to consider the object and purpose of investment treaties to be the protection of foreign investors and their investments.³⁸⁹ Other tribunals have elaborated on this basic premise indicating that the purpose of such treaties is to promote economic cooperation and stimulate the flow of capital and technology through the reciprocal encouragement and protection of foreign investments³⁹⁰ usually through the creation and maintenance of a stable investment

70(2)—a predecessor of Vienna Convention Article 30(1)—which referred specifically to the 'objects and purposes of the treaty' (emphasis added). *YILC* (1964-II), at 52.

³⁸⁵ It would be expected that if the reference was specifically to the terms of the treaty, the word 'their' instead of 'its' would have been used.

³⁸⁶ See, e.g., *SOABI (Jurisdiction)*, at para. 35; *Bayindir*, at para. 96; *Wena Hotels (Jurisdiction)*, at 82; *American Manufacturing (Award)*, at 28, para. 5.36; Keith Highet's Dissenting Opinion in *Waste Management (Opinion)*, at para. 33; *Tokios (Jurisdiction)*, paras 46 and 83; *SGS v Pakistan*, at para. 164; and *SGS v Philippines*, at para. 135.

³⁸⁷ See, e.g., *Loewen (Award)*, para. 161; and *Mondev*, at para. 91.

³⁸⁸ Fauchald, *supra* note 11, at 322-323.

³⁸⁹ See, e.g., *Santa Elena (Award)*, at 170, para. 64; *Tokios (Jurisdiction)*, at para. 32; *El Paso*, para. 68; *Eureko*, at para. 248; *Loewen (Jurisdiction)*, at para. 53; *Sempra Energy (Jurisdiction)*, at para. 142; and *SGS v Philippines*, at para. 116. Even when interpreting domestic law that consents to the submission of a claim by a foreign investor to ICSID, it has been said that relevant legislation should be interpreted in favour of the objectives of investor protection and ICSID Convention jurisdiction. See, e.g., *Tradex (Jurisdiction)*, at 68.

³⁹⁰ See, e.g., *Gruslin*, at para. 13.8; *Aguas del Tunari*, at paras. 153 and 241; and *CSOB (Jurisdiction)*, at para. 64; *Tokios (Jurisdiction)*, at para. 31; *Tokios (Opinion)*, Dissenting Opinion of Prosper Weil, at para. 2; and Brownlie's Separate Opinion in *CME (Final Award)*, at para. 17. As to the ICSID Convention, the Executive Directors of the World Bank have stated that its primary purpose is to

environment or favourable investment conditions³⁹¹ and through an independent, non-political and neutral forum for the resolution of investment disputes.³⁹² The *Siemens* tribunal for example observed that the intended consequence of this promotion and protection of investments is that they ‘may stimulate private economic initiative and increase the well-being of the peoples of both countries.’³⁹³ Similar objects and purposes have been identified in respect of multilateral treaties such as the NAFTA³⁹⁴ and the ECT.³⁹⁵

‘stimulate a larger flow of private international investment into its territories’. Executive Directors’ Report, at para. 12.

³⁹¹ See, e.g., *CMS (Award)*, at para. 274; *Tokios (Jurisdiction)*, at para. 31; *MTD (Award)*, at para. 104; and *SGS v Philippines*, para. 116.

³⁹² See, e.g., *CME v Czech Republic (Partial Award)*, at para. 417; *Aguas del Tunari*, at para. 247; *Plama (Jurisdiction)*, at paras. 141 and 193; *Banro American Resources v Congo* at paras. 16 and 19; *Aguas del Tunari*, at para. 153; *Maffezini*, at 402, para. 31; *CAA-Vivendi (Challenge)*, at para. 11; *CSOB (Jurisdiction)*, para. 57; *AAP*, at para. 51; and *Enron (Jurisdiction) (Ancillary Claim)*, at para. 37. See also Prosper Weil’s Dissenting Opinion in *Tokios (Opinion)*, at para. 21 in which he emphasises that the ICSID arbitration mechanism was established to resolve disputes between States and foreign investors, not disputes between States and their own nationals. In relation to the views of domestic courts, see *Republic of Guinea v Atlantic Triton Company Limited*, 26 October 1984, Cour d’appel, Rennes (Second Chamber), 3 ICSID Reports 3, at 8 (the ICSID Convention was concluded ‘to establish machinery which would be widely accepted for conciliation and arbitration, to which the Contracting States and nationals of other Contracting States could submit their disputes relating to private international investments, rather than submitting such disputes to municipal courts’). This decision, however, was overturned by the French Cour de cassation (First Civil Chamber).

³⁹³ *Siemens (Jurisdiction)*, at para. 81. See also *Phoenix*, at para. 87 (the purpose of the ICSID Convention ‘is to encourage and protect *international investment made for the purpose of contributing to the economy of the host State*’ (original emphasis)). Whether investment treaties actually increase investment into countries is the subject of debate. See, e.g., Vis-Dunbar and Nikiema, ‘Do Bilateral Investment Treaties Lead to More Foreign Investment?’, *Investment Treaty News*, 30 April 2009; Rose-Ackerman, ‘Do BITs Benefit Developing Countries?’, in Rodgers and Alford (eds.), *The Future of Investment Arbitration* 131 (2009); and Salacuse and Sullivan, ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain’, 46 *Harvard International Law Journal* 67 (2005).

³⁹⁴ See, e.g., *Feldman (Jurisdiction)*, at para. 35 (referring to Article 102(1)(c) and (e) of the NAFTA, according to which ‘[t]he objectives of this Agreement, as elaborated more specifically through its principles and rules,’ are to ‘increase substantially investment opportunities in the territories of the Parties’ and to ‘create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes’); *Metalclad (Award)*, at para. 70 (holding that the objective of NAFTA ‘specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties’, citing NAFTA Article 102(1)(c)); *Metalclad (Award)*, at para. 71 (‘[t]he Parties to NAFTA specifically agreed to “ensure a predictable commercial framework for business planning and investment”’, citing NAFTA Preamble, para. 6 (emphasis omitted)); and at para. 75 (‘[a]n underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives’, citing NAFTA Article 102(1)); and *Loewen (Award)*, at para. 222 (‘NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States’). See also *ADF*

184. The issue of the legitimacy of a pro-investment interpretative bias resulting from interpretations based on investment promotion objectives is discussed in Chapter VI, Section G below. A treaty may, however, contain other objects and purposes that may be used in a way that does not favour investors in all cases, as was indicated in *Saluka*:

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.³⁹⁶

185. Additionally, the *Amco* tribunal stated that the ICSID Convention 'is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries'.³⁹⁷ A much more politically oriented objective of the ICSID Convention was highlighted in *Banro*:

One of the main objectives of the mechanisms instituted by the Washington Convention was to put an end to international tension and crises, leading sometimes to the use of force, generated in the past by the diplomatic protection accorded to an investor by the State of which it was a national.³⁹⁸

186. An aim of the ECT as stated in its introductory note is that of encouraging respect for the rule of law. On this basis, the *Plama* tribunal held that substantive

(*Award*), at para. 147 (discussing the problems of applying the general objectives of NAFTA to particular provisions).

³⁹⁵ See, e.g., *Plama (Jurisdiction)*, at paras. 141 and 161.

³⁹⁶ *Saluka (Award)*, at para. 299. On this issue, see generally Omar E. García-Bolivar, 'The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements', 6(5) *Journal of World Investment and Trade* 751 (2005).

³⁹⁷ *Amco (Jurisdiction)*, at para. 23. See also *ibid*, at para. 249.

³⁹⁸ *Banro*, at para. 15.

protections cannot apply to investments that are made contrary to law. This may be seen as an example where an aim of a treaty works to the detriment of an investor.³⁹⁹

187. The difference between the object of a treaty on the one hand and its purpose on the other has rarely been addressed in FIAT case law. An insight into the distinction between the object and the purpose is, nonetheless, provided in Prosper Weil's Dissenting Opinion in *Tokios*. In that opinion he indicated, quoting from the Executive Directors' Report, that the *object* of the ICSID Convention is to 'offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply'.⁴⁰⁰ He said, in contrast, that the primary *purpose* of the ICSID Convention is to 'stimulate a larger flow of private international investment into territories'.⁴⁰¹ Professor Weil, as a native speaker of French, would have been aware of the distinction between the 'object' and 'purpose' to which Yasseen (discussed in the international law section above) referred.

188. An overall conclusion that could be made in relation to the object and purpose criterion is that it is subsidiary to the ordinary meaning criterion.⁴⁰² Nonetheless, the former criterion has sometimes played a dominant role in the interpretative process. A prime example is found in *SGS v Philippines*, where the BIT in dispute was seen to provide investors and their investments with a broad protection. The tribunal, rather controversially, gave considerable effect to this object and purpose.⁴⁰³ In a number of

³⁹⁹ *Plama (Award)*, at para. 139.

⁴⁰⁰ *Tokios (Jurisdiction)*, at para. 3.

⁴⁰¹ *Ibid.* Contrast this with Professor Brownlie's Separate Opinion in *CME (Final Award)*, para. 17, in which he stated that '[o]ne of the *objects* [of the BIT in dispute] was the stimulation of the economic development of the parties' (emphasis added). In this regard, it is useful to compare the Executive Directors' Report, which states that 'the broad *objective* of the Convention is to encourage a larger flow of private international investment' (emphasis added), at para. 13. Thus, it may be said that despite the close similarity in appearance between 'object' and 'objective', the latter word relates more to the purpose of a treaty.

⁴⁰² See also a similar conclusion in Fauchald, *supra* note 11, at 323.

⁴⁰³ *SGS v Philippines*, at para. 116. A similar position was taken by the majority in *Tokios (Jurisdiction)*, at para. 31, 32, 77 and 85. But compare this to the Dissenting Opinion of Prosper Weil in *Tokios (Opinion)*, at para. 19. See also *Siemens (Jurisdiction)*, at para. 92 (determining that '[w]hile

other cases, FIATs have given weight to the object and purpose as justifying a broad or expansive rather than restrictive interpretation of its jurisdiction.⁴⁰⁴ Reliance on the object and purpose also arises where the FIAT has considered that the interpretation asserted by a party would frustrate,⁴⁰⁵ defeat,⁴⁰⁶ or be irreconcilable,⁴⁰⁷ inconsistent⁴⁰⁸ or otherwise be incompatible⁴⁰⁹ with the object and purpose of the treaty or its provisions.⁴¹⁰

these considerations may follow a strict logical reasoning based on the terms of the Treaty, their result does not seem to accord with its purpose’); *Wena Hotels (Jurisdiction)*, at 84; and *SD Myers (Partial Award)*, at para. 229.

⁴⁰⁴ See, e.g., *Tokios (Jurisdiction)*, at para. 46; *Wena (Annulment)*, 41 ILM 881 (2002), at 888; and *Auconen (Jurisdiction)*, at para. 109. See also *Feldman (Jurisdiction)*, at para. 35.

⁴⁰⁵ *Santa Elena (Award)*, at 170, para. 64; and *Mondev*, at para. 91.

⁴⁰⁶ *Aguas del Tunari*, at para. 153.

⁴⁰⁷ *Maffezini (Jurisdiction)*, at 402, para. 31.

⁴⁰⁸ *Tokios (Jurisdiction)*, at paras. 32, 46, 77 and 86; *Aguas del Tunari*, at para. 247; and *CAA-Vivendi (Challenge)*, at para. 11.

⁴⁰⁹ See, e.g., *Pope & Talbot (Merits, Phase 2)*, at para. 116; and *Siemens (Jurisdiction)*, at para. 92.

⁴¹⁰ This line of FIAT authority is reflective of the many similarities between the object and purpose criterion and the principle of effectiveness. See Chapter V, Section F.

C. ARTICLE 31(2)

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.⁴¹¹

1. Introduction

189. Article 31(2) of the Vienna Convention augments the Article 31(1) context criterion. It is a composite of four separate elements, one or more of which may of themselves assist in determining the appropriate context of a treaty text subject to interpretation. The four elements are (1) the preamble, (2) the annexes, (3) an agreement by all parties connected with the treaty's conclusion, and (4) an instrument relating to the treaty's conclusion made by one or more parties but accepted by all the others. An important function of Article 31(2) is to ensure that the use of agreements and instruments connected with a treaty's conclusion is not treated as a subordinate Article 32 means of interpretation.⁴¹²

190. Generally, the international case law relating to Articles 31(2)(a) and (b) is sparse. Most international practice in this area relates to written instruments associated with the conclusion of conferences or agreements.⁴¹³ Given the paucity of the materials in respect of Article 31(2), the discussion that follows does not contain

⁴¹¹ This provision is the progeny of the following ILC draft articles: Article 71(1), Waldock III, *YILC* (1964-II), at 52; Article 69(2), ILC Draft Articles 1964, *YILC* (1964-II), at 199; and Article 27(2), ILC Draft Articles 1966, *YILC* (1966-II), at 217. See Annex II.

⁴¹² In respect of the international law position, see generally, Fitzmaurice, *supra* note 76, at 12; Fitzmaurice (1957), *supra* note 185, at 218; and Thirlway, *supra* note 91, at 37.

⁴¹³ See Aust, *supra* note 4, at 189-191. See, e.g., the eleven resolutions adopted by the Diplomatic Conference of 1949 when it adopted the four Geneva Conventions on international humanitarian law. Pictet, *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958), at 651.

separate sections for the pertinent FIAT and international law jurisprudence (as has been the usual structure adopted in this thesis). These will be discussed together.

2. Preamble

191. As discussed in the previous Section, numerous references have been made to the preamble in FIAT interpretations to cast light on the object and purpose of the treaty in dispute.⁴¹⁴ This accords with the use of the preamble in treaty interpretation in international law.⁴¹⁵

192. Also to be noted in relation to preambles is the reluctance of FIATs to consider them as stand-alone substantive provisions. The *Bayindir* tribunal, in examining the preamble of the BIT in question—which contained an express reference to fair and equitable treatment—stated as follows:

Despite the use of the verb “agree”, it is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT.⁴¹⁶

193. This finding is consonant with international law, as is demonstrated by the following observation in the *Beagle Channel* arbitration:

Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—in short they are not operative clauses—it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order as it were, to ‘situate’ it in respect of its objects and purpose.⁴¹⁷

⁴¹⁴ See, e.g., *Amco (Jurisdiction)*, at para. 23; *SGS v Philippines*, at para. 116; *Tokios (Opinion)*, at para. 6; *Tecmed*, at para. 156; *Siemens (Jurisdiction)*, at para. 81; *American Manufacturing (Opinions)*, Arbitrator Golsong’s Separate Opinion, at 40, para. 13; *Bayindir*, at para. 137; *Metalclad (Award)*, at para. 71; and *CSOB (Jurisdiction)*, at paras. 64 and 73.

⁴¹⁵ See *supra* note 360.

⁴¹⁶ *Bayindir*, at para. 230. The relevant provision of the BIT provided:

The Islamic Republic of Pakistan [...] and the Republic of Turkey [...] agre[e] that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.

⁴¹⁷ (*Argentina v Chile*) (1977) 52 ILR 93, at 132, para. 19.

3. Annexes

194. No FIAT award reviewed made reference to an annex as forming part of the context during the interpretation of a treaty.⁴¹⁸ Similarly, there is a paucity of material on this subject on the international law plane.⁴¹⁹

195. A distinctive practice is found concerning the interpretation of annexes in the NAFTA and the 2004 US Model BIT. A tribunal hearing disputes arising out of these agreements may be obliged to request that the interpretation of certain annexes be made, respectively, by the FTC or the State parties. Interpretations issued under these procedures are binding on the tribunal.⁴²⁰

4. Agreement or Instrument in connection with Conclusion of Treaty

196. Of the FIAT awards reviewed, only one referred to an agreement or instrument in connection with the conclusion of a treaty. This occurred in the *Yaung Chi Oo Trading v Myanmar* award, in which the Joint Press Release of the Inaugural Meeting of the ASEAN Investment Council was held to be ‘clearly an authoritative statement made by relevant ministers of ASEAN Member States, including the Myanmar Minister of Industry, as to their intentions at the time of the conclusion of the Agreement’.⁴²¹ The press release appears to have had characteristics resembling an Article 31(2)(b) instrument more than an Article 31(2)(a) agreement. Whether it was categorized as one or the other would have made no real substantive difference.⁴²²

⁴¹⁸ For the sake of completeness, reference should be made to *Lauder (Award)*, at para. 220 (noting that a right to make an exception to a discriminatory measure in the BIT at issue was permitted if a reservation were made in an annex to that treaty; but no such reservation was made).

⁴¹⁹ For example, Sinclair, *supra* note 6, at 127-130, fails to mention annexes in his discussion on the context criterion.

⁴²⁰ See *supra* note 161.

⁴²¹ *Yaung Chi Oo Trading v Myanmar (Award)*, at para. 74.

⁴²² Another instrument in connection with the conclusion of a treaty that is relevant to investment law is Chairman’s Statement made at the Adoption Session of the Energy Charter Treaty, 17 December 1994.

197. Similar agreements or instruments are not uncommon in the general domain of international law.⁴²³ For example, during the conclusion of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property⁴²⁴ full agreement about the scope of the Convention could not be agreed. As a result, the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (established by the General Assembly) drafted a document entitled “Understandings with respect to certain provisions of the Convention”, which is annexed to the Convention.

⁴²³ See, e.g., Gardiner, *Treaty Interpretation* (2008), at 212-216.

⁴²⁴ UN Doc. A/RES/59/38, 16 December 2004.

D. ARTICLE 31(3)

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.⁴²⁵

1. Introduction

198. The agreements, practice or rules referred to in Article 31(3) are to be ‘taken into account, together with the context’. The wording suggests that the three categories do not form part of the context but are in addition to it. In reality, it makes no difference whether or not they constitute the context. The important consequence of Article 31(3) is that should any factors falling within the Article 31(3) criteria be relevant to an interpretation, they are to be included in the initial Article 31(1) interpretative process and should not be relegated to a subsidiary Article 32 analysis.⁴²⁶

199. Attention should be drawn, however, to the intention behind the adoption of the words ‘should be taken into account’. Waldock explained that he preferred that an interpretation take into account the three criteria in Article 31(3) rather than require the interpretation to ‘be subject to’ those three items. He believed that this would

⁴²⁵ This provision evolved from the following ILC draft articles: Articles 70 (1)(b) and 73, Waldock III, *YILC* (1964-II), at 52; Articles 69(1)(b) and 69(3), ILC Draft Articles 1964, *YILC* (1964-II), at 199; and Article 27(3), ILC Draft Articles 1966, *YILC* (1966-II), at 218. See Annex II.

⁴²⁶ See, e.g., the comment in *Oppenheim* that Article 31(3) words ‘together with’ indicated ‘that the stipulations which follow are to be taken as incorporated in the basic statement of the rule, and not as norms of an inferior character.’ *Oppenheim, supra* note 4, at 1274, n. 17. The position taken in *Oppenheim* is reflective of the ILC’s view:

these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those that precede them.

YILC (1966-II), at 220, para. 9.

‘leave open the results of the interpretation’.⁴²⁷ In other words, if an interpretation was ‘subject to’ certain criteria, it would have imposed a stronger—almost mandatory—obligation on the interpreter to give effect to those criteria in comparison to the less rigorous duty to ‘take account’ of them.

200. Significance has also been placed on the use of ‘agreement’ in Article 31(3)(b). The word recommended by the ILC was ‘understanding’. The Vienna Conference expressed a preference for the use of ‘agreement’ rather than ‘understanding’. The former term implies a higher standard of formality than what an ‘understanding’ may involve.⁴²⁸

201. Another general point that needs to be made in respect of Article 31(3) is that it refers to ‘any subsequent agreement between *the parties*’ or subsequent practice that ‘establishes the agreement of *the parties*’. This wording is to be contrasted with Article 31(2), which speaks of ‘any agreement ... made between *all* the parties’ and any instrument made between one or more parties and ‘accepted by *the other parties*’. A grammatical argument could conclude that there is a substantive difference between the phrasings in Articles 31(2) and (3) but, in practice, the failure of the drafters to utilize ‘all’ or ‘the other parties’ in Article 31(3) is largely a semantic difference and has not proved to be a significant point of controversy.

2. *Subsequent Agreement or Practice*

a) *International Law Practice*

202. Article 31(3)(a) acknowledges the freedom of the parties to vary the terms that were agreed subsequent to the conclusion of the treaty. The consequences of a subsequent agreement by all the parties interpreting their treaty was described by the ILC as follows:

⁴²⁷ Waldock III, at 61 (para. 32)

⁴²⁸ See Annex II.

an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.⁴²⁹

203. In practice, Sinclair has observed that State recourse to subsequent interpretative agreements is rare. This attitude may be reflective of (1) the reluctance to disturb the delicate balance of compromises embedded in most treaties, (2) the interest of one of the parties to maintain an ambiguity in the terms or, (3) in the case of a multilateral treaty, the difficulties involved in obtaining the consent of all the parties to the interpretation and ensuring compliance with the stipulations contained in Part II (concerning conclusion and entry into force of treaties) and Article 40 of the Vienna Convention.⁴³⁰

204. Under Article 31(3)(b), subsequent conduct in the application of a treaty must be sufficient to ‘establish’ an agreement as to the treaty’s interpretation. Numerous cases before the ICJ have required the Court to refer to subsequent practice in determining the meaning of a treaty provision.⁴³¹

205. The reason for the importance placed on subsequent practice is to a large extent the high probative value of State conduct.⁴³² As the ILC commented,

⁴²⁹ *YILC* (1966-II), at 221, para. 14. The rule has close ties to the legal maxim *ad quem pertinet iuris constitutio, ad ipsum pertinet interpretatio* (‘the one who makes the law is the one who is competent to interpret it’). In the *Chamizal Arbitration* (US v Mexico), 5 *AJIL* 782 (1911), at 805, the award found that ‘it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the Treaties of 1848 and 1853’ that they were precluded from asserting otherwise.

⁴³⁰ See, e.g., Yasseen, *supra* note 194, at 44.

⁴³¹ See, e.g., the *Kasikili/Sedudu Island* case, in which the ICJ stated that ‘[i]ndeed in the past, when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty’, ICJ Reports 1045 (1999), para. 50, citing several ICJ decisions. More recently, see *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), ICJ Reports 625 (2002), para. 37.

⁴³² See McNair, at 424.

subsequent practice ‘constitutes objective evidence of the understanding of the parties as to the meaning of the treaty’.⁴³³

b) FIAT Practice

206. Rather than arranging the following section into cases that fall specifically within either Article 31(3)(a) or (b), it will proceed to discuss the two provisions together. This approach is due largely to the difficulty in classifying the conduct of the treaty parties as an *agreement* (which, as discussed below, need not be in writing) under Article 31(3)(a) as opposed to an instance of Article 31(3)(b) *practice* establishing an agreement. Instead, the cases have been grouped into the following categories: (1) those in which there appeared to be a concordance of views by all the parties to the treaty and (2) those that involved interpretations by one or more treaty parties but where it is unknown whether all parties were in agreement.

207. Before proceeding to analyse the cases in this manner, it is appropriate to mention the discussion in *Methanex (Final Award)* as to the form of a subsequent agreement under Article 31(3)(a). The tribunal there stated that:

... Independent of the effect under Article 1131(2) NAFTA of the FTC’s Interpretation of 31st July 2001, that “interpretation” also evidences, according to the USA, an agreement between the NAFTA Parties as to the meaning of Article 1105 NAFTA which it is appropriate for the Tribunal to take into account. In this respect, the Tribunal notes that whilst the language of Article 31(3)(a) is clear, it is useful also to refer for the purposes of confirmation to the International Law Commission’s Commentary on what was then Article 27(3)(a). This states that: “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”. This passage was cited (with apparent approval) by the International Court of Justice in the *Kasikili/Sedudu Island* case.

... It follows from the wording of Article 31(3)(a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a treaty; and indeed, were this to be the case, the provision would be otiose. According to Daillier et al., *Droit International Public*, as to a subsequent agreement on interpretation: “Il est admis que cet accord postérieur peut être tacite et résulter des pratiques concordantes des Etats quand ils appliquent le traité” (“It is accepted that this subsequent agreement may be tacit and result from the concordant practice of States when they apply the treaty”). From the ICJ’s approach in the *Kasikili/Sedudu Island* case, it appears that no particular

⁴³³ YILC (1966-II), at 221, para. 15.

formality is required for there to be an “agreement” under Article 31(3)(a) of the Vienna Convention.

... In the light of these factors, the Tribunal has no difficulty in deciding that the FTC’s Interpretation of 31st July 2001 is properly characterised as a “subsequent agreement” on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention.⁴³⁴

208. Concordant practice of the NAFTA States as reflected in their interpretations of the FTC may thus be seen as evidence of a subsequent agreement, which draws attention to the less than clear border between an Article 31(3)(a) agreement or an Article 31(3)(b) practice.⁴³⁵

209. Also, it also bears noting that the ICSID Convention did not define the type of ‘investment’ over which an ICSID tribunal has jurisdiction pursuant to Article 25 of the Convention. The drafters of the Convention gave contracting States the freedom to define in subsequent BITs the precise type of investment in respect of which ICSID tribunals will have jurisdiction. However, subsequent definitions that States may agree to in BITs are not the type of subsequent agreements contemplated by Article 31(3) because these clearly are not agreements between all the parties to the ICSID Convention.

(i) Subsequent Concordance of All the Parties

210. An instance of subsequent concordance of parties in relation to the interpretation of a treaty is found in the practice of Argentina and Panama. Those two States, in direct response to the *Maffezini* tribunal’s interpretation of an MFN clause,

⁴³⁴ *Methanex (Final Award)*, at Part II, Chpt. B, paras. 19-21 (footnotes omitted). See also *Methanex (Final Award)*, at Part II, Chpt. H, para. 23, (noting that while it should look to the ordinary meaning of the provisions that had been interpreted by the FTC Interpretation pursuant to Article 31(1), it should also take into account the FTC Interpretation in accordance with Article 31(3)(a) and adding ‘[i]ndeed, according to *Oppenheim*’s, an authentic interpretation by treaty parties overrides the ordinary principles of interpretation’), quoting *Oppenheim*, *supra* note 4, at 630.

⁴³⁵ In connection with the issue of a subsequent agreement amending a treaty, the *Methanex (Final Award)* added the following:

... Article 39 of the Vienna Convention on the Law of Treaties says simply that “[a] treaty may be amended by agreement between the parties”. No particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification.

Methanex (Final Award), at Part IV, Chapt. C, para. 21.

exchanged diplomatic notes with an ‘interpretative declaration’ concerning the MFN clause in their 1996 BIT. This declaration, the two States stated that it had always been their intention, contrary to the finding in *Maffezini*, that MFN clauses did not extend to dispute resolution clauses.⁴³⁶

211. In *CAA Vivendi (Challenge)*, the *ad hoc* Committee considered that ICSID Arbitration Rule 53

was adopted unanimously and was treated by the Members of the [ICSID] Administrative Council as uncontroversial. In the circumstances, the unanimous adoption of Arbitration Rule 53 can be seen, if not as an actual agreement by the States parties to the Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation.⁴³⁷

The ICSID Administrative Council is composed of a representative of each State party to the ICSID Convention.⁴³⁸

212. Negotiations as to the revision of a BIT by both of its State parties may in certain circumstances provide guidance as to the subsequent common understanding of both parties in regard to that BIT. In *Plama*, the tribunal drew the following inferences from negotiations subsequent to the conclusion of the 1987 Bulgaria-Cyprus BIT:

Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions ... It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.⁴³⁹

213. The United States argued in *Methanex* that the concordant submissions made in those proceedings by itself, Canada and Mexico, i.e., all three parties to the

⁴³⁶ This exchange of diplomatic notes is noted in *National Grid (Jurisdiction)*, at para. 85.

⁴³⁷ *CAA Vivendi (Challenge)*, at para. 12, citing Article 31(3) of the Vienna Convention.

⁴³⁸ See Article 4 of the ICSID Convention.

⁴³⁹ *Plama (Jurisdiction)*, at para. 195. This finding was made despite the tribunal’s observation in the immediately preceding paragraph that it found ‘no guidance in the provisions of paragraphs 2 and 3 of Article 31 of the Vienna Convention, as there are no facts or circumstances that point to their application’. *Plama (Jurisdiction)*, at para. 194.

NAFTA, as to the interpretation of that treaty constituted a subsequent agreement or subsequent practice of all State parties to that treaty.⁴⁴⁰ While the tribunal was not required to rule on this point, it may be arguable that a coordinated or joint submission by all parties to a treaty expressing the same interpretation may satisfy Article 31(3)(a) or (b). But care must be exercised here as it might be unfair to the investor if the meaning of a treaty can be changed in this way after the dispute has arisen. This point was touched upon in *Aguas del Tunari*. The tribunal there indicated that both State parties to the relevant BIT could not determine what constitutes the tribunal's jurisdiction once a BIT claim had been made.⁴⁴¹ In other words, after a claimant institutes a treaty claim, a subsequent agreement by the State parties to that treaty, which purports to modify the jurisdictional mandate of the tribunal, would not be determinative of a FIAT's jurisdiction over the presented claim.

214. The *CME* final award provides a contrast. The proceedings there were instituted in 2000 pursuant to the 1991 Netherlands-Czech and Slovak Federal Republic BIT. 'Agreed Minutes' signed and exchanged between the Netherlands and the Czech Republic as to their common position in respect of the interpretation of Article 8.6 of that BIT were concluded in 2002. This 'common position' was used by the *CME* tribunal to support its interpretation of the BIT. No express reference to Article 31(3) was made by the tribunal.⁴⁴²

215. Another situation in which the practice of States that could arguably be considered as subsequent concordance relates to the joint publication of investment guides or brochures by both State signatories to a BIT.⁴⁴³ But usually these guides are general in nature and are unlikely to provide sufficient specificity to aid or enrich an interpretation.

⁴⁴⁰ *Methanex (Partial Award)*, at para. 101.

⁴⁴¹ *Aguas del Tunari*, at para. 263. See also *Bayindir*, at para. 178.

⁴⁴² See *CME (Final Award)*, paras. 89 *et seq.*, 400 and 437. See also the Svea Court of Appeal Judgment (Sweden), *Czech Republic v CME Czech Republic BV* of 15 May 2003, at pp. 6-7 of English translation.

⁴⁴³ See dissenting opinion of Dr El Mahdi in *SPP (Jurisdiction)*, at para. 29 (although his views were on a 'for the sake of argument' basis).

(ii) Subsequent Practice of One or More States

216. On a number of occasions FIATs have indicated that subsequent practice of one or more State parties may assist in interpreting their treaty.

217. The investment treaty practice of Venezuela was examined as part of the *Fedax* tribunal's interpretation of the term 'investment' in the 1991 Netherlands-Venezuela BIT. This practice revealed that, in various other investment treaties, every time Venezuela 'has wished to exclude investments that are not manifestly direct, it has done so in unequivocal terms'. This practice was used to support the tribunal's interpretation of an investment.⁴⁴⁴ However, it is relevant to note here the view of the *Enron* tribunal: 'that a treaty may have provided expressly for certain rights of shareholders does not mean that a treaty not so providing has meant to exclude such rights if this can be reasonably inferred from the provisions of such a treaty'.⁴⁴⁵ Tribunals must thus be careful of attributing a meaning to one treaty from a State's general practice. A tribunal's reference to other treaties in the process of interpretation is dealt with in Chapter V, Section C.

218. The tribunal in *Gruslin* was required to interpret a 1979 intergovernmental agreement between Malaysia and the Belgio-Luxembourg Economic Union ('Intergovernmental Agreement'). In 1992, Belgium, by way of a *note verbale*, sought clarification from Malaysia as to the term 'approved project' in the Intergovernmental Agreement and Malaysia clarified the matter in a responsive *note verbale* to Belgium. The sole arbitrator considered that this exchange of *note verbales*

⁴⁴⁴ *Fedax (Jurisdiction)*, at para. 36. The two instruments specifically mentioned by the tribunal were concluded subsequent to the 1991 Netherlands - Venezuela BIT. In *Plama (Jurisdiction)*, at para. 195, reference was made to Bulgaria's practice in concluding investment treaties subsequent to its conclusion of the 1987 Bulgaria-Cyprus BIT that was invoked in that case. The tribunal held that in the circumstances of that case the subsequent practice was not particularly relevant. Also in *Camuzzi (Jurisdiction)*, at para. 134, the tribunal referred to other investment treaties concluded by Argentina in when interpreting the 1990 Argentina - Belgo-Luxembourg BIT. See also *Sempra Energy (Jurisdiction)*, at para. 142; and *Mihaly*, at para. 58.

⁴⁴⁵ *Enron (Jurisdiction)*, at para. 46.

does not effect a direct amendment to the terms of the IGA. However, at this peak level of intercourse between states it must be regarded as an enduring and authoritative engagement expressing to the Belgo-Luxemburg Union the manner in which the Respondent regards and applies the terms of the IGA with regard to investments made in its territory by nationals of the Belgo-Luxemburg Union.⁴⁴⁶

219. Ultimately, the tribunal held that Malaysia's *note verbale* thus was too obscure and of uncertain effect to be of assistance.⁴⁴⁷ Nonetheless, had this *note verbale* been sufficiently clear, the tribunal appears to have been open to giving it some weight.

220. The most detailed FIAT analysis and application of Article 31(3) is found in *Aguas del Tunari*. Information relevant to that case appeared to have been discussed in Dutch parliament. Two rounds of questions by Dutch parliamentarians addressed to two government ministers asked whether the Bolivia-Netherlands BIT could be invoked in the dispute before the *Aguas del Tunari* tribunal. The ministerial response on both occasions effectively declined to indicate whether that dispute fell under the BIT; the answer was said to be at the discretion of the tribunal.⁴⁴⁸ However, after a third round of questions to the same two ministers, as well as another, the ministerial response expressed the view that the BIT was not applicable to the *Aguas del Tunari* arbitration. Bolivia, the respondent in *Aguas del Tunari*, used the Dutch governmental response to the third round of questions to assert that both State parties to the Bolivia-Netherlands BIT were of the view that BIT did not apply in that case.⁴⁴⁹

221. Referring to Article 31(3)(a) of the Vienna Convention, the *Aguas del Tunari* tribunal concluded that despite both States' views being related to the dispute before it, they were

⁴⁴⁶ *Gruslin*, at para. 23.4.

⁴⁴⁷ *Gruslin*, at paras. 23.12-23.16

⁴⁴⁸ *Aguas del Tunari*, at paras. 253-4.

⁴⁴⁹ *Aguas del Tunari*, at para. 249.

not a ‘subsequent agreement between the parties.’ The coincidence of several statements does not make them a joint statement. And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement.⁴⁵⁰

222. The tribunal thereafter examined whether the Bolivian position asserted before the tribunal and the internal Dutch government statements could constitute ‘subsequent practice’ in accordance with Article 31(3)(b).

223. In the opinion of the tribunal, the third response from the Netherlands government was inconsistent with the first two responses and appeared to refer incorrectly to the latter. It concluded that ‘[a]s a result, little can be concluded from the three written replies of The Netherlands government’.⁴⁵¹ Nonetheless, because of the great weight placed on these replies by the respondent, the tribunal decided to write to Mr. Lammers, the Legal Advisor of the Foreign Ministry of the Netherlands and put to him several related questions.⁴⁵² It was considered that it would assist the tribunal to have further limited information concerning the basis for the Dutch government statements.⁴⁵³

224. The tribunal received a reply from Mr Lammers to which there was attached a document entitled ‘Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, signed on 19 March 1992 and entered into force on first November 1994’. In relation to the content of this document, the tribunal made three observations.

225. First, the document contained comments only of a general nature, possibly relevant to confirm an interpretation pursuant to Article 32 of the Vienna Convention.

⁴⁵⁰ *Aguas del Tunari*, at para. 251.

⁴⁵¹ *Aguas del Tunari*, at para. 257.

⁴⁵² The entire letter is attached to the awards as Appendix III.

⁴⁵³ *Aguas del Tunari*, at para. 258. A pertinent passage of the letter is set out below:

If the Government’s statement replying to the Parliamentary questions of 19 April 2002 reflects an interpretative position of general application held by the Government of the Netherlands, the Tribunal requests that the Government provide the Tribunal with information (of the type suggested by Articles 31 and 32 of the Vienna Convention on the Law of Treaties as being possibly relevant) upon which that general interpretative position is based.

It did not provide information of the type covered by Article 31 that would have been possibly relevant and upon which a general interpretative position could have been based. Accordingly, the tribunal made no use of the document to arrive at its decision.⁴⁵⁴

226. Secondly, the letter of Mr. Lammers stated that the answers given to the parliamentary questions ‘were based on information from the press which at the time the answers were given “may not necessarily have been correct”’.⁴⁵⁵ On the basis of these first two observations, the tribunal found no ‘subsequent practice ... which establishes an agreement of the parties’ in respect of the interpretation of the BIT.

227. The third observation was that the tribunal was

not presented with, and therefore need not consider, the situation where the two state parties to a BIT both express the position that a tribunal lacks jurisdiction over a particular dispute before a tribunal. The inconsistency between the first and second replies of The Netherlands government, on the one hand, and its third reply, on the other hand, and the apparent incorrect reference in the latter to the first two replies does not, in the Tribunal’s view, express with any clarity the position that the BIT does not apply in this case.⁴⁵⁶

228. In addition to this, and perhaps most important of all, was the tribunal’s ‘firm view that it is the Tribunal, and not the contracting parties, that is the arbiter of its jurisdiction’.⁴⁵⁷ In other words, even if any plausible concordance of views had existed between Bolivia and the Netherlands in connection with the tribunal’s jurisdiction under the BIT, such consensus was not definitive—the tribunal still retained an overriding authority to make an assessment as to whether it possessed jurisdiction.

⁴⁵⁴ *Aguas del Tunari*, at para. 260.

⁴⁵⁵ *Aguas del Tunari*, at para. 262, quoting from the letter of Mr. Lammers.

⁴⁵⁶ *Aguas del Tunari*, at para. 263. A footnote appended to this last sentence maintained as follows:

The majority of the Tribunal accepts that the first two replies by the Dutch government properly reflect its view or intention which is consistent with our view that the Tribunal must be the arbiter of its jurisdiction. It is for an arbitral tribunal to determine in specific factual circumstances whether an investor falls within the scope of a bilateral investment treaty.

⁴⁵⁷ *Aguas del Tunari*, at para. 263.

3. Any Relevant Rules of International Law

a) International Law Practice

229. Reference to ‘any relevant rules of international law applicable in the relations between the parties’ as provided under Article 31(3)(c) is in many respects pragmatic. A heavy burden would be imposed on the drafters of treaties if they were required to make express reference to every international law rule relevant to the treaty that will result from the drafting process.⁴⁵⁸ As the award in the *Georges Pinson* case held:

[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.⁴⁵⁹

230. The reference to ‘rules’ in Article 31(3)(c) is not defined. The ILC’s commentary fails to discuss why the term ‘rules’ was adopted in preference to ‘principles’. There is no reason why this provision should not apply equally to principles.⁴⁶⁰ Limitations are nonetheless contained in the sub-paragraph: the rules or principles must be those that are ‘relevant’ and ‘applicable in the relations between the parties’.

231. Commentators have understood this sub-paragraph as bearing wide meaning. Sinclair, in his explanation of the provision notes that ‘every treaty provision must be

⁴⁵⁸ This has long been realised in the domestic context. For example, in the interpretation of English statutes, it has been observed that they ‘often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ...’ Bell and Engle (eds.), *Cross on Statutory Interpretation* (1995), at 165.

⁴⁵⁹ *Georges Pinson* case, France-Mexico Claims Commission, (1927-28) *Annual Digest* 426, at 426-427; and 5 *RIAA* 327 (1928), at 422.

⁴⁶⁰ See Douglas, *The International Law of Investment Claims* (2009), at 86, para. 154 (the Article 31(3)(c) reference to ‘rules’ is ‘best understood as any legal norms’). For a discussion of the differences between principles and rules, see Chapter I, Section A(2) above.

read not only in its own context, but in the wider context of general international law, whether conventional or customary.’⁴⁶¹ *Oppenheim* states as follows:

Account is taken of any relevant rules of international law not only as constituting the background against which the treaty’s provisions must be viewed, but in the presumption that the parties intend something not inconsistent with the generally recognised principles of international law, or with previous treaty obligations towards third states.⁴⁶²

232. Schwarzenberger considered such recourse as serving three purposes:

It assists in counterbalancing the tendency to overemphasise the completeness of any treaty system. It helps in avoiding unlikely or absurd conclusions. It imposes further restraints on interpretation by reference to other treaties. Thus, this form of crosscheck with other potentially relevant rules assists greatly in a balanced use of the teleological method of treaty interpretation.⁴⁶³

233. Until recently, however, the application of this Article 31(3)(c) has been infrequent. McLachlan, for example, has described the provision as ‘the neglected son of treaty interpretation’.⁴⁶⁴ One reason suggested for the low frequency of its use is that the principle expressed is the obvious—it ‘operates, on most occasions, as an unarticulated major premise in the construction of treaties’.⁴⁶⁵ Lately, however, increased attention has been given to Article 31(3)(c), an interest ascribed in large measure to the treatment of this provision in the ICJ *Oil Platforms* judgment and individual opinions.⁴⁶⁶ The ICJ there took a wide view of Article 31(3)(c),

⁴⁶¹ Sinclair, *supra* note 6, at 139. See also McLachlan, at 290 (Article 31(3)(c) is ‘apt to include all of the sources of international law, including custom, general principles, and, where applicable, other treaties’).

⁴⁶² *Oppenheim*, at 1275.

⁴⁶³ Schwarzenberger, *International Law* (1957), Vol. 1, at 529. See similarly, Lauterpacht, *Development of International Law* (1958), at 27-28; Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), at 655; Crandall at 394, §170; and C. Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, 30 *British Yearbook of International Law* 401-453 (1953), at 451.

⁴⁶⁴ McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54 *ICLQ* 279 (2005), at 289. See also Sands, ‘Treaty, Custom and the Cross-fertilization of International Law’, 1 *Yale Human Rights and Development Journal* 85 (1998), at 95.

⁴⁶⁵ McLachlan, ‘The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention’, 54 *ICLQ* 279 (2005), at 280.

⁴⁶⁶ ICJ Reports (2003); 42 ILM 1334 (2003). See McLachlan, *ibid.*, at 279; and French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, 55 *ICLQ* 281 (2006), at 281. See also the reference to Article 31(3)(c) in the recent cases of *Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, Permanent Court of Arbitration, 2 July 2003, paras.

interpreting the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran⁴⁶⁷ by reference to the international law rules on the use of force by States. The Court's position is to be contrasted with the one expressed by Judge Higgins in her Separate Opinion. She considered that the Treaty of Amity was an economic and commercial treaty and that the 'relevant rules' criterion under Article 31(3)(c) was not intended to incorporate 'the entire substance of international law on a topic not mentioned in the clause—at least not without more explanation than the Court provides'.⁴⁶⁸ She considered that the Court had not given sufficient emphasis to the text of the provision to be interpreted:

The Court has, however, not interpreted Article XX, paragraph 1 (*d*), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 (*d*), with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 (*d*), is lost.⁴⁶⁹

234. Later in her opinion she wrote that the Court was 'reformulating the matter as one of self-defence under international law rather than "necessary" action for the "protection of essential security interests" within the terms of the 1955 Treaty' and as such, the Court narrowed

the range of factual issues to be examined. Through this recasting of the United States case the Court reduces to nil the legal interest in what was happening to oil commerce generally during the 'Tanker War'. Instead it makes the sole question that of whether an attack on two vessels ... constituted an armed attack on the United States that warranted military action in self-defence.⁴⁷⁰

235. Given the generality of Article 31(3)(c), and an absence of a settled view on its proper operation in the *Oil Platforms* case, it will be a rule likely to give rise to a conflict of views in future cases before the ICJ.

93-105, 42 ILM 1118 (2003), 1144; and *Al-Adsani v United Kingdom*, ECHR, 123 ILR 24 (2001), at 40, paras. 55-6, 34 EHRR 273.

⁴⁶⁷ Signed in Tehran on 15 August 1955 and entered into force on 16 June 1957.

⁴⁶⁸ *Ibid.*, Higgins, Separate Opinion, at para. 46.

⁴⁶⁹ *Ibid.*, Higgins, Separate Opinion, at para. 49.

⁴⁷⁰ *Ibid.*, Higgins, Separate Opinion, at para. 51.

b) FIAT Practice

236. In dealing with relevant rules of international law within the framework of ICSID arbitrations, reference should be made to Article 42(1) of the ICSID Convention which indicates the applicable law of the dispute includes ‘the law of the Contracting State party to the dispute ... and such rules of international law as may be applicable’. The Executive Directors’ Report comments that the term ‘international law’ as used in Article 42(1) should be understood in the sense given by Article 38(1) of the ICJ.⁴⁷¹ Despite this guidance, Schreuer comments:

The reference to the enumeration of sources of international law as contained in Art. 38(1) of the ICJ Statute by no means resolves the problem of establishing the rules of international law relevant to the particular dispute. It is debatable whether the list provided there paints a complete picture of contemporary international law and whether the neat categories suggested there conform to the complex realities of international legal practice. Nevertheless, this reference demonstrates that an ICSID tribunal is directed to look at the full range of sources of international law in a similar way as the International Court of Justice.⁴⁷²

237. The first and foremost point of reference in the interpretation of a treaty, as will be recalled, is the text of the treaty. The Waste Management tribunal emphasised the text’s importance when it stated ‘[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise’.⁴⁷³ Consistent with this textual emphasis, other FIATs have also held that only if the treaty is silent or unclear on an issue will recourse be had to general rules of international law.⁴⁷⁴

238. The situation that arises when the chosen rules conflict with customary rules of international law not mentioned in the treaty was addressed in *AES v Argentina*. The

⁴⁷¹ Executive Directors’ Report on the ICSID Convention, at para. 40.

⁴⁷² Schreuer, *supra* note 5, at 610.

⁴⁷³ *Waste Management II (Award)*, at para. 85.

⁴⁷⁴ See, e.g., *SD Myers (Partial Award)*, at para. 310 ([t]here being no relevant provisions of the NAFTA other than those contained in Article 1110 the Tribunal turns for guidance to international law’); *Loewen (Award)*, at para. 226; *Methanex (Final Award)*, Part IV, Chpt. B, para. 37; and *Feldman (Jurisdiction)*, at paras. 36.

tribunal there referred to the following ‘fundamental principle of international law’, which it considered it must respect:

the rule according to which ‘*specialia generalibus derogant*’, from which it derives that treaty obligations prevail over rules of customary international law under the condition that the latter are not of a peremptory character ...⁴⁷⁵

239. As a corollary, silence has not been viewed as a method drafters consciously use to exclude any important international law rules. The position taken by the *Loewen* tribunal is demonstrative:

We accept that an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (Elsi) (United States v Italy)* (1989) ICJ 15 at 42). Such an intention may, however, be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.⁴⁷⁶

240. The FIAT case law reviewed shows that the following international law rules have been taken into account by FIATs in interpreting treaties, often without articulating that they are applying Article 31(3)(c) of the Vienna Convention Rules:

a) the principle of good faith;⁴⁷⁷

b) principles relating to the law of treaties;⁴⁷⁸

⁴⁷⁵ *AES v Argentina (Jurisdiction)*, at para. 23. Similarly, the *Methanex* tribunal took the view that if the chosen rules in a treaty are inconsistent with imperative principles of international law or *jus cogens*, the tribunal has an independent duty not to give effect to the parties’ choice of rules. *Methanex (Final Award)*, at Part IV, Chapt. C, paras. 24-25. This finding is consistent with Article 53 of the Vienna Convention. See also *AAP*, at paras. 21 and 22; *LGE (Liability)*, at para. 97; *Enron (Jurisdiction)*, at para. 46 (observing that each treaty ‘must be interpreted autonomously ... in the light of its interconnections with international law’); and *Olguín (Jurisdiction)*, at para. 83.

⁴⁷⁶ *Loewen (Jurisdiction)*, at para. 73. An almost identical finding is made in the tribunal’s final award, at para. 160, which finding was approved in *SGS v Pakistan*, at para. 171, n. 178. See also *Maffezini (Jurisdiction)*, at 400, para. 22; and Brownlie’s Separate Opinion in *CME (Final Award)*, at para. 108.

⁴⁷⁷ *Tecmed*, at para. 154 (‘[t]he Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment’).

- c) State responsibility rules under which actions of a political subdivision of a federal State are attributable to the central government;⁴⁷⁹
- d) State responsibility rules that determine whether a particular entity is a State body;⁴⁸⁰
- e) rules as to the nationality of a claimant;⁴⁸¹
- f) principles as to the assessment of compensation;⁴⁸² and
- g) rules relating to the continuous national identity of claimants.⁴⁸³

241. In terms of substantive provisions, Article 31(3)(c) allows FIATs to interpret provisions such as ‘fair and equitable treatment’ as the meaning may develop in international law over time.⁴⁸⁴ For example, the *Mondev* tribunal made an ‘evolutionary interpretation’ of Article 1105(1) of the NAFTA, which took into account ‘current international law, whose content is shaped by the conclusion of more

⁴⁷⁸ The FIAT jurisprudence applying the Vienna Convention Rules as detailed in this thesis provides unshakable support for this point. See also *Metalclad (Award)*, at para. 100; and *CSOB (Jurisdiction)*, at para. 39.

⁴⁷⁹ *CAA (Award)*, at para. 49.

⁴⁸⁰ *Maffezini (Jurisdiction)*, at 413, para. 76 ([s]ince neither the Convention nor the Argentine-Spanish BIT establish guiding principles for deciding the here relevant issues, the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body’).

⁴⁸¹ *Tokios (Jurisdiction)*, at para. 70 ([a]s with the [ICSID] Convention, the definition of corporate nationality in the Ukraine-Lithuania BIT is also consistent with the predominant approach in international law’); *Feldman (Jurisdiction)*, at para. 36; and *Amco (Annulment)*, at para. 37.

⁴⁸² *SD Myers (Partial Award)*, at para. 309 (‘the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA’); and Brownlie’s Separate Opinion in *CME (Final Award)*, para. 108 ([i]n relation to the issue of [compensation for] speculative benefits it is relevant to note that, in case the treaty provisions are not in themselves clear, the Vienna Convention justifies reference to the position in general international law’).

⁴⁸³ *Loewen (Award)*, at para. 226 (‘it is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity’). This tribunal’s eventual decision on this point, however, has been subject to criticism. See, e.g., Maurice Mendelson, ‘The Runaway Train: the “Continuous Nationality Rule” from the *Panevezys-saldutiskis Railway* case to *Loewen*’, in Weiler, Todd (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), 97, at 136

⁴⁸⁴ McLachlan, Shore and Weiniger, *International Investment Law: Substantive Principles* (2007), at 222-223, at para. 7.69.

than two thousand bilateral investment treaties and many treaties of friendship and commerce.⁴⁸⁵

242. A unique feature of FIAT jurisprudence is that reference is made not only to international law but also to established principles, laws or rules in international arbitration to interpret treaties. For example, references have been made to

- a) the ‘principle of the separability (autonomy) of the arbitration clause’,⁴⁸⁶
- b) ‘the laws of evidence generally and by the customs of evidentiary production in international arbitration generally’,⁴⁸⁷
- c) and ‘fundamental rules of procedure’.⁴⁸⁸

243. Although the use of Article 31(3)(c) by FIATs has been relatively uncontroversial, it has potential to create controversy in the future if, like in the ICJ *Oil Platforms* case, it is applied to invoke a rule in a manner that may be considered as displacing the applicable law.

⁴⁸⁵ *Mondev*, at paras. 123-125. See also *Tecmed*, at para. 155; and *ADF (Award)*, at para. 179 and 183.

⁴⁸⁶ *Plama (Jurisdiction)*, at para. 212 (interpreting an MFN clause).

⁴⁸⁷ *Aguas del Tunari*, Procedural Order No 1 concerning the Discontinuance of Proceedings with respect to Aguas Argentinas SA, para. 13, quoted in *Aguas del Tunari*, at para. 25.

⁴⁸⁸ See *MINE (Annulment)*, at paras. 5.05-06. (in interpreting Article 52(1) of the ICSID Convention, it referred to Article 18 of the UNCITRAL Model Law as an example of such a procedure). See also Article 52(1)(d) of the ICSID Convention, which refers to ‘a serious departure from a fundamental rule of procedure’ as constituting a ground for annulment.

ARTICLE 31(4)

A special meaning shall be given to a term if it is established that the parties so intended.⁴⁸⁹

a) International Law Practice

244. The ordinary meaning of a text may be displaced by application of Article 31(4). Of all the Vienna Convention Rules, this is the only provision that makes explicit reference to the intentions of the parties.⁴⁹⁰ The provision does not require that those intentions be evidenced in writing.

245. It was debated in the ILC whether Article 31(4) served any purpose because some members considered the special meaning would be apparent from the context. Nevertheless, it was considered that there was a certain utility in including the rule, ‘if only to emphasise that the burden of proof lies on the party invoking the special meaning of the term’.⁴⁹¹

246. The invocation of this provision is rare in international law. The *Continental Shelf Arbitration* between the UK and France provides an example of its application. In that case, the tribunal accepted the French contention that the expression ‘Bay of Granville’ was considered by the parties as covering the whole of the Channel Islands region. The tribunal noted that, normally, the geographical expression ‘Bay of Granville’ would have been used in a more restricted sense but in this particular case documents evidenced that negotiations relating to the Channel Islands region as a whole took place under the rubric ‘Granville Bay’.⁴⁹²

⁴⁸⁹ This provision evolved from the following ILC draft articles: Article 70 (3), Waldock III, *YILC* (1964-II), at 52; Article 71, ILC Draft Articles 1964, *YILC* (1964-II), at 199; and Article 27(4), ILC Draft Articles 1966, *YILC* (1966-II), at 218. See Annex II.

⁴⁹⁰ See Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 1 (1978), at 44.

⁴⁹¹ *YILC* (1966-II), at 222.

⁴⁹² *Delimitation of the Continental Shelf* (UK v France), Award of 30 June 1977, 54 ILR 6, at 57, para. 74. Compare the declaration of Herbert W. Briggs, *ibid.*, at 131.

b) FIAT Practice

247. Much like the position in international law, FIAT practice is exiguous in relation to Article 31(4). In the FIAT case law reviewed, specific reference to that provision has occurred only in *Aguas del Tunari*. In that case, the tribunal's comprehensive interpretative analysis of a disputed BIT phrase touched upon almost every element of Article 31. In this analysis, the tribunal made express reference to Article 31(4) but noted only that

[t]here is no indication in the record that any special meaning for the word 'controlled' [the term in dispute] was intended by these contracting parties. The Tribunal observes, however, that the negotiators of the Netherlands – Bolivia BIT likely possessed a sophisticated knowledge of business and law. For such persons, the ordinary meaning of a word or phrase also includes the legal meanings given to such words or phrases.⁴⁹³

248. Definitional sections in treaties obviously may provide express elaborations of particular meanings that parties intended to give to certain terms.⁴⁹⁴ The benefit of definitions in the context of investment treaties was alluded to by the *Aguas del Tunari* tribunal: 'the purpose of stimulating investment is furthered by clear definitions which thereby allow potential investors to ascertain whether they are, or are not, covered by a particular BIT'.⁴⁹⁵

249. However, Article 31(4) of the Vienna Convention has no practical value in relation to explicit definitions because they may be regarded as part of the treaty text that must be interpreted according to Article 31(1). Article 31(4) is likely to assume relevance only when the special meaning is able to be evidenced from materials or circumstances external to the treaty.

⁴⁹³ *Aguas del Tunari*, at para. 230. The dissentient in that case, arbitrator Alberro-Semerena, concurred with this observation. *Aguas del Tunari*, Dissenting Opinion, at para. 27.

⁴⁹⁴ See, e.g., *Loewen (Jurisdiction)*, at para. 40; *Middle East Cement*, at paras. 100-101; *Enron (Jurisdiction) (Ancillary Claim)*, at paras. 29-32; *Enron (Supplemental Claim)*, at paras. 30-32; *Bayindir*, at para. 113; and *Tokios (Jurisdiction)*, at para. 77.

⁴⁹⁵ *Aguas del Tunari*, at para. 313.

250. Limits exist, however, in relation to the freedom of parties to define terms or give them special meanings. This limit is particularly evident in the ability of States to define the type of investment disputes that may be settled by ICSID arbitration. As Prosper Weil stated in his Dissenting Opinion in *Tokios*:

it is not for the Parties [to a BIT] to extend the jurisdiction of ICSID beyond what the Convention provides for. It is the Convention which determines the jurisdiction of ICSID, and it is within the limits of the ICSID jurisdiction as determined by the Convention that the Parties may in their BIT define the disputes they agree to submit to an ICSID arbitration.⁴⁹⁶

251. Similarly, the *Aucon* tribunal indicated that while the ICSID Convention gave State parties a good deal of autonomy to define some of its terms, these definitions needed to be reasonable or otherwise not inconsistent with the purposes of the ICSID Convention.⁴⁹⁷ Nevertheless, it is accepted that States may formulate broad definitions of the term ‘investment’ as found in Article 25 of the ICSID Convention.

252. In connection with definitions, it bears mention that BITs traditionally do not define substantive terms such as ‘expropriation’ or ‘deprivation’ of property.⁴⁹⁸ These are fact-sensitive terms and interpretations or applications of them are usually influenced not by their ‘ordinary meaning’ but by the accumulated body of relevant international case law and commentary on those terms.⁴⁹⁹ However, more recent versions of investment treaties are starting to define some of these terms.⁵⁰⁰

⁴⁹⁶ *Tokios (Opinion)*, at para. 16.

⁴⁹⁷ *Aucon (Jurisdiction)*, at paras. 114-116. Likewise, the *Enron* tribunal held that the discretion of States is limited when defining the meaning of ‘investment’ in Article 25 of the ICSID Convention ‘because they could not validly define as investment in connection with something absurd or entirely incompatible with its object and purpose’. *Enron (Jurisdiction)*, at para. 42.

⁴⁹⁸ See, e.g., *Lauder*, at para. 200 (‘Bilateral Investment Treaties ... generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession (“dispossession”, “taking”, “deprivation”, or “privation”)’).

⁴⁹⁹ See Douglas, *The International Law of Investment Claims* (2009), at p. 82, para. 143.

⁵⁰⁰ See, e.g., the ‘shared understanding’ of the parties as to the meaning of expropriation in Annex B of the 2004 US Model BIT.

Chapter IV

SUPPLEMENTARY MEANS OF INTERPRETATION

Chapter outline: Having discussed the Vienna Convention Article 31 'general rule' of interpretation in Chapter III, this Chapter turns to examine the use of supplementary means to interpret treaties as provided for in Article 32. Section A introduces that provision, following which Section B discusses the role of preparatory work in interpretation. Sections C and D cover, respectively, the use of supplementary means to confirm or determine a meaning. Also relevant to this Chapter are Annexes I and II of the thesis, which provide a guide to the drafting history of Article 32.

A. ARTICLE 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.⁵⁰¹

253. The inclusion of the words 'may' and 'supplementary' in Article 32 indicates that provision's subsidiarity in relation to Article 31. In the words of the ILC, '[t]he word "supplementary" emphasizes that article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation

⁵⁰¹ This final text of Article 32 of the Vienna Convention evolved from the following ILC draft articles: Article 71(2), Waldock III, *YILC* (1964-II), at 52; Article 70, ILC Draft Articles 1964, *YILC* (1964-II), at 199; and Article 28, ILC Draft Articles 1966, *YILC* (1966-II), at 218. See Annex II.

governed by the principles contained in article [31].’⁵⁰² Despite this Article’s designation as subsidiary, many international courts and tribunals (including FIATs) refer to preparatory work during the Article 31 phase of the interpretation without exhausting all the possible avenues of investigation provided under that provision.⁵⁰³ In relation to FIAT practice, in a few notable cases the tribunal resorted to the preparatory work at a very early stage. For example, the *Fedax* tribunal, when determining the existence of a ‘legal dispute’ as required by Article 25(1) of the ICSID Convention, turned to the ‘drafting history’ of the Convention in the following manner:

the Tribunal must first consider whether there is a legal dispute between the parties as required by Article 25(1) of the Convention. Although the term ‘legal dispute’ is not defined in the Convention, its drafting history makes abundantly clear that such term refers to conflicts of rights as opposed to mere conflicts of interest ...⁵⁰⁴

254. This tendency to have recourse to preparatory work relatively early in the interpretation process—divergent as it is from the sequence prescribed by the Vienna Convention Rules—may provide a fast-track and relatively accurate method of interpreting a provision containing uncontroversial terms. In the appropriate circumstances, this approach may be preferred to embarking upon a detailed application of Article 31 and 32 but caution must be exercised not to ignore completely the Article 31 criteria.⁵⁰⁵

⁵⁰² *YILC* (1966-II), at 224, para. 19. See also *YILC* (1966-II), at 223. The secondary role allocated to the preparatory work in the Vienna Convention was the subject of vigorous debate during the Vienna Conference. The position taken by the United States was essentially to amalgamate Article 31 and the Article 32 supplementary means of interpretation. See, e.g., McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967), at 365 ([‘i]n some contexts ... the most reliable clue to the shared expectations of the parties comes from the *travaux*’). Sinclair saw the US proposal as placing primary emphasis on the text of the treaty but opposed the proposal because ‘it gave equal weight to a series of factors of greater or lesser significance in treaty interpretation and was likely to open the door to a never-ending stream of inquiry for would-be interpreters, and to encourage unnecessary disputes.’ *VCOR* 1968, p. 184, paras. 67-9.

⁵⁰³ See Gardiner, *Treaty Interpretation* (2008), at 45.

⁵⁰⁴ *Fedax (Jurisdiction)*, at 189, para. 15. In that same paragraph, the tribunal referred also to the ‘discussions held on the drafts leading up to this provision’. See also *Fireman’s Fund*, at para. 94; and *Klöckner (Annulment)*, at para. 119.

⁵⁰⁵ See e.g. *United States v Canada*, LCIA Case No. 81010, Expert Opinion by Professor W. Michael Riesman, ‘Opinion with respect to Selected International Legal Problems in LCIA Case No. 7941’, 1

255. One problem that the subsidiary nature of Article 32 helps to overcome is the lack of availability of preparatory work to developing States or investors. This means that even if it is not available, it the chances are that it may not be critical—what is of primary importance is the text of the treaty and the application of Article 31.

256. In his general course on public international law at The Hague Academy, Eduardo Jiménez de Aréchaga referred to an intriguing reason why some considered that preparatory work should be given only a secondary role in treaty interpretation:

[to] place *travaux préparatoires* on the same level as the “context” of the treaty ... would create the risk that the preparatory work might be utilized by a party in order to advance an interpretation at variance with the text and modifying its meaning. Experience shows that such extrinsic materials are sometimes allowed to infiltrate a text with a view to evading clear obligations.⁵⁰⁶

257. Article 32 is commonly perceived as relating to the use of the preparatory work in interpretation. However, it goes further. It permits, in appropriate situations, the circumstances of a treaty’s conclusion to be taken into account, and generally allows all other ‘supplementary means of interpretation’. No definition is provided as to what should constitute these ‘supplementary means’. Absent any precise guide as to the content of these secondary means of interpretation, the canvas of potentially applicable interpretative aids or guidelines remains large.

B. PREPARATORY WORK GENERALLY

a) International Law Practice

258. The ILC took the view that use of supplementary means of interpretation designated in Article 32 was an

exception to the rule that the ordinary meaning of the terms must prevail. ... The Commission considered that the exception must be strictly limited, if it is not to weaken

May 2009, at para. 7 (‘A failure to apply the rules of interpretation perforce distorts the resulting interpretation of the parties’ agreement and is a species of the application of the wrong law’).

⁵⁰⁶ Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 1 (1978), at 46. Other observations on the reliability of preparatory work are discussed in Chapter VI.

unduly the authority of the ordinary meaning of the terms. Sub-paragraph (6) is accordingly confined to cases where interpretation under article 27 [which eventually became Article 31] gives a result which is manifestly absurd or unreasonable.⁵⁰⁷

259. The ILC also decided against including a definition of preparatory work in the Vienna Convention Rules as it considered that such a definition might possibly lead to the exclusion of relevant evidence.⁵⁰⁸ Given the absence of a definition, Aust's elucidation of the concept is helpful. He indicated that the preparatory work includes 'successive drafts of the treaty, conference records, explanatory statements of an expert consultant at the codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries'.⁵⁰⁹ He adds that the value of such material

will depend on several factors, the most important being authenticity, completeness and availability. The summary record of a conference prepared by an independent and experienced secretariat will carry more weight than an unagreed record produced by a host state or a participating state. However, even the records of a conference served by a skilled secretariat will generally not tell the whole story. The most important parts of negotiating and drafting often take place informally, with no agreed record being kept. The reason why a particular compromise formula was adopted, and what it was intended to mean, may be difficult to establish. This will be especially so if the form of words was deliberately chosen to overcome a near irreconcilable difference of substance.⁵¹⁰

260. There is scant jurisprudence in both in international law and FIAT awards concerning the limb of Article 32 that deals with the circumstances of a treaty's conclusion. One reason that may explain this situation is that the circumstances falling within this criterion may also overlap with or be treated as part of the Article 31(1) object and purpose analysis, as an Article 31(2)(a) or (b) factor or generally as part of the preparatory work.⁵¹¹ Sinclair identified the essence of the criterion when he observed that it 'may have some value in emphasising the need for the interpreter

⁵⁰⁷ *YILC* (1966-II), at 223, para. 19.

⁵⁰⁸ *YILC* (1966-II), at 223, para. 20.

⁵⁰⁹ Aust, *Handbook of International Law* (2005), at 95. *Oppenheim*, *supra* note 4, at 1277, observes that the preparatory work includes 'the record of the negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of committees of the Conference which adopted a treaty, the successive drafts of a treaty, and so on'.

⁵¹⁰ Aust, *Handbook of International Law* (2005), at 95 (footnote omitted).

⁵¹¹ See Sinclair, *supra* note 6, at 141.

to bear constantly in mind the historical background against which the treaty has been negotiated'.⁵¹² Neither the text nor the preparatory work may provide this historical background, which may take into account some wide-ranging factors. Sinclair added, for example, that under this element of Article 32:

[i]t may also be necessary to take into account the individual attitudes of the parties – their economic, political and social conditions, their adherence to certain groupings or their status, for example, as importing or exporting country in the particular case of a commodity agreement – in seeking to determine the reality of the situation which that parties wished to regulate by means of the treaty.⁵¹³

261. Aust has further observed that the preparatory work may override the ordinary meaning in the following circumstances:

It has been suggested that, even when the ordinary meaning appears to be clear, if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, the primary duty in Article 31(1) to interpret a treaty in good faith requires a court to 'correct' the ordinary meaning. This is no doubt how things work in practice; for example, the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it. The suggestion is therefore a useful addition to the endless debate on the principles of interpretation.⁵¹⁴

262. This position is not consistent with the ILC's intentions as to the exceptional and limited role of subsidiary means of interpretation extracted above. As regards the pitfalls of preparatory work, Sinclair drew attention to the following:

the obscurity of a particular text will often find its origin in the *travaux préparatoires* themselves. The natural desire of negotiators to bring negotiations to a successful conclusion will often result in the adoption of vague or ambiguous formulations. Sometimes the parties will have deliberately wished to avoid too much precision in order to allow themselves in future to argue that the provision as formulated does not commit

⁵¹² Sinclair, *supra* note 6, at 141. *Oppenheim* addresses this criterion in the following terms:

the circumstances of a treaty's conclusion may be invoked to ascertain its meaning, since a treaty is not concluded as an isolated act but as part of a continuing series of international acts which shape and limit the circumstances with which the treaty deals.

Oppenheim, *supra* note 4, at 1278. See also Yasseen, *supra* note 194, at 90.

⁵¹³ Sinclair, *supra* note 6, at 141.

⁵¹⁴ Aust, *supra* note 4, at 197 (footnotes omitted), citing Schwebel, 'May Preparatory Work Be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?', in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, (1996), 541-547.

them to an inconvenient or too onerous obligation. Finally, the *travaux préparatoires* are unlikely to reveal accurately and in detail what happened during the negotiations, since, more often than not, they will not disclose what may have been agreed between the heads of delegations during private corridor discussions.⁵¹⁵

263. Finally, Eduardo Jiménez de Aréchaga made the following notable conclusions in respect of preparatory work:

preparatory work is frequently examined and often taken into account. It may be difficult in practice to establish the borderline between confirming a view previously reached and actually forming it, since this belongs to the mental processes of the interpreter. In any case, the importance of *travaux préparatoires* is not to be underestimated and their relevance is difficult to deny, since the question whether a text can be said to be clear is in some degree subjective. On the other hand, the separation between Articles 31 and 32 and the restrictions contained in the latter provision constitute a necessary safeguard which strengthens the textual approach and discourages any attempt to resort to preparatory work in order to dispute an interpretation resulting from the intrinsic material set out in Article 31.⁵¹⁶

264. It is not uncommon for international courts and tribunals to exercise caution in cases where their decision may turn on preparatory work.⁵¹⁷

b) FIAT Practice

265. The non-mandatory character of Article 32 has led to instances where FIATs have chosen not to have recourse to the means of interpretation covered by that provision. A case on point is *Sempra Energy*, in which the tribunal acknowledged that Article 31(1) is the ‘principal means of interpretation’ and went on to hold that the terms of the treaty at issue were sufficiently clear not to resort to supplementary means of interpretation.⁵¹⁸ This subsidiary nature of Article 32 was expressly

⁵¹⁵ Sinclair, *supra* note 6, at 142. For a more detailed and equally enlightening description of the drawbacks of recourse to preparatory work, see Fitzmaurice, *supra* note 76, at 15-17.

⁵¹⁶ Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des cours* 1 (1978), at p. 47-48.

⁵¹⁷ See, e.g., *Border and Transborder Armed Actions* (Nic. v. Hon.), ICJ Reports 69 (1988), at 85, para. 37, where the ICJ expressed that caution must be exercised when referring to the *travaux préparatoires* where it was apparent not all the stages of the drafting of the treaty at issue were the subject of detailed records.

⁵¹⁸ *Sempra Energy (Jurisdiction)*, at para. 142. See also *Camuzzi (Jurisdiction)*, at para. 134 (holding that the treaty was sufficiently clear ‘making it unnecessary to resort to supplementary means’ of interpretation but proceeding to refer to the ‘negotiating history’ to confirm its position); *Enron (Jurisdiction) (Ancillary Claim)*, at para. 31 (‘[i]n view of the explicit text of the treaty and its object

emphasised in *Aguas del Tunari* when the tribunal remarked that the ILC Commentary on this article noted that ‘the “supplemental” role of Article 32 serves to emphasize the centrality of Article 31’.⁵¹⁹

266. Concerning the types of materials that constitute preparatory work, FIAT jurisprudence is generally consistent with Aust’s description quoted above.⁵²⁰ While it would be expected that States that have participated in the drafting of a treaty are privy to these materials, unless they are made available to the public, it is unlikely that such materials will be accessible to investor claimants. This issue is discussed in Section VI(F) below.

267. FIATs have provided some practical insights as to how the preparatory work can be evidenced. Obviously, detailed and comprehensive documents accepted by the parties relating to the drafting of the text and minutes of discussions or negotiations are likely to constitute evidence of the highest order.⁵²¹ In this regard, the documents

and purpose, it is not even necessary to resort to supplementary means of interpretation’) and at para. 32 (indicating that in the circumstances at hand there existed sufficient elements of interpretation in connection with Article 31 of the Vienna Convention that it was not necessary to resort to supplementary means of interpretation); *Canfor Corporation (Decision of Preliminary Question)*, at para. 324 (‘because the language of [NAFTA] Article 1902(2)(b) and Article 1902(2)(c) is so plain that, for interpretive purposes, there is no occasion for recourse to supplementary sources of evidence under the terms of the [Vienna Convention]’) and at para. 265; and *Champion Trading (Jurisdiction)*, 19 ICSID Review, at p. 288. See also *Methanex (Final Award)*, at Part II, Chpt. B, para. 22 (drawing attention to the limited circumstances in which recourse to Article 32 could be had).

⁵¹⁹ *Aguas del Tunari*, at para. 93, citing the ILC’s Commentary to Article 28, para. 18, *YILC* (1966-II), at 223. See also *Noble Ventures (Award)*, at para. 50 (‘recourse may be had to supplementary means of interpretation ... only in order to confirm the meaning resulting from the aforementioned methods of interpretation’); and *Klöckner (Annulment)*, at para. 119, in which the tribunal was reluctant to base an interpretation on the preparatory work.

⁵²⁰ See note 509 above. As an example of the types of materials FIATs consider to constitute preparatory work, see *Pope & Talbot (Damages)*, at para. 39 (referring to a ‘record of discussions leading up to agreement upon the final text of Article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters’). These are rather obvious embodiments of preparatory work. As to less clear materials, see, e.g., *Mondev*, in which the tribunal stated

Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*.

Mondev, at para. 111 (footnote omitted).

⁵²¹ It must be noted that records of the preparatory work that are fragmentary must be used with caution. See, e.g., Rejoinder of the United States of 17 December 2001 to Methanex’s Reply Submission in the *Methanex* case, quoted in *Pope & Talbot (Damages)*, at para. 35.

and meeting minutes relating to the ICSID Convention have most conveniently been published in English, French and Spanish.⁵²² In connection with NAFTA, after some criticism and controversy about the non-disclosure of the negotiation texts of Chapter 11, on 16 July 2004 the FTC announced their public release.⁵²³ In contrast, the preparatory work of a BIT is relatively difficult to ascertain by the general public, including the investor.⁵²⁴

268. Concerning the drafting of the ICSID Convention, FIATs have considered the recollections of Aron Broches as reliable evidence of the preparatory work of the ICSID Convention. He was chairman of the consultative meetings for the negotiation of the ICSID Convention and undoubtedly played a major role in the Convention's drafting process.⁵²⁵ Statements of delegations to the negotiation of the ICSID Convention have also been used in support of its interpretation.⁵²⁶

269. In relation to BITs, the *Sempra Energy* tribunal took the view that 'the opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaties [is not] irrelevant, in that it serves, precisely, to establish the original intention'.⁵²⁷ But this type of evidence has its limits. In *Eureko*, the recollections of an official negotiating a BIT for one of the State parties was considered to be rebutted by a contrary recollection by a negotiator for the other State party to that treaty.⁵²⁸ Further, the tribunal in *Tza Yap Shum* did not consider the testimony of one of the

⁵²² See *supra* note 40.

⁵²³ Available at <www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp>. Whether this release contains all the relevant documents pertaining to the negotiation history is a subject of contention. See comment in <www.naftaclaims.com>.

⁵²⁴ See particularly Chapter VI, Section F below.

⁵²⁵ See, e.g., *Fedax (Jurisdiction)*, at para. 21 (noting as 'most pertinent' the account of the ICSID Convention negotiations by Broches in 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction', 5 *Columbia Journal of Transnational Law* 261 (1966), at 268); and *Aguas del Tunari*, at para. 284 (referring to the Hague Lectures of Aron Broches).

⁵²⁶ See, e.g., *CAA Vivendi (Award)*, at para. 52.

⁵²⁷ *Sempra Energy (Jurisdiction)*, at para. 145.

⁵²⁸ To support its interpretation of the Netherlands-Poland BIT, Poland submitted in the *Eureko* case the opinion of a Polish Foreign Ministry official involved in the negotiation of that treaty. This was rebutted by a contrary opinion of a Dutch Foreign Ministry official. *Eureko*, at para. 185, n. 17.

negotiators to the BIT at issue as convincing evidence of the contracting parties' intention in regard to the scope of the MFN clause in that treaty.⁵²⁹

270. In many FIAT awards, recourse to preparatory work has not been considered as an extremely useful aid to treaty interpretation. First and foremost, the preparatory work is usually treated as subordinate to the text and is often not decisive in itself. The *Siemens* case illuminates this point in its finding that no matter how complex or contested the negotiation process proved to be, the fact that it was a difficult process still does not dilute the evidentiary strength of the words that were ultimately agreed.⁵³⁰ Then, access to the preparatory work (particularly by a private individual or an investor) could prove extremely difficult and, if access is available, the documentation might be incomplete or inadequate to draw any conclusion. Many parties to treaties, particularly developing States, do not have the governmental resources to document the preparatory work relating to treaties they enter. The tribunal in *Aguas del Tunari*, for instance, concluded from the evidence that documentation of the Boliva-Netherlands BIT negotiation history was sparse and that it 'offered little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation.'⁵³¹ Thomas Wälde has observed in this regard that '[t]here is a great temptation on controversial issues to delve into the travaux, but the result of such trawls for favourable evidence is as a rule not very trustworthy'.⁵³² Additionally, where a body

⁵²⁹ *Tza Yap Shum*, at para. 212.

⁵³⁰ *Siemens (Jurisdiction)*, at para. 106 (noting that the arduousness of the negotiations process does not affect the legal significance of the text that was eventually agreed). See also *Tza Yap Shum*, at paras. 166-171 where witness statements were submitted by negotiators of both State parties to the BIT in question but were not given significant weight by the tribunal.

⁵³¹ *Aguas del Tunari*, at para. 274. See also *Canfor Corporation (Decision of Preliminary Question)*, at para. 265 ('the available legislative history of NAFTA does not assist in the interpretation of Article 1901(3), simply because there is none available that is relevant'); Dissenting Opinion of Hight in *Waste Management (Opinion)*, at 475, para. 44, n. 35 ('[t]he record before the Tribunal is unfortunately bare of useful evidence of *travaux préparatoires* of NAFTA in this regard'); and *CAA-Vivendi (Challenge)*, at paras. 12 and 24.

⁵³² Thomas W. Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues', (2004) 1(1) *Transnational Dispute Management*.

of case law has built up around the interpretation of a certain provision, it may be more difficult to resort to Article 32. In this connection, the *Methanex* tribunal stated

[w]here in the course of time there has been a series of decisions on a given provision by international tribunals seized with the task of interpretation; and there has also been an agreement by treaty parties on interpretation, the likelihood of supplementary means of interpretation contemplated by Article 32 of the Vienna Convention being relevant and material must inevitably decline.⁵³³

271. Preparatory work evidencing the abandonment or rejection of a drafting proposal may be considered as providing a meaningful indication as to the intent of the drafters.⁵³⁴ But there may be circumstances where although the preparatory work indicates that a proposed provision is rejected during negotiations, it may not necessarily mean that the intention was to exclude such a provision. This situation arose in *Amco*. The tribunal there observed that a vote during the ICSID Convention drafting process to reject a motion (proposing a provision under which a failure to state reasons would be a ground for annulment) could not necessarily be regarded as a manifest objection to the content of the proposed provision because the delegates voting to reject the motion may simply have found it redundant due to the clause's prior approval and adoption in a previous phase of the negotiations.⁵³⁵

272. The *AAP* tribunal drew attention to the potential benefits that may be derived from well documented preparatory work in the following passage of its award:

in the absence of *travaux préparatoires* in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiation the necessity of disregarding the common habitual pattern adopted by the previous treaties, and to establish a 'strict liability' in favour of the foreign investor as one of the objectives of their treaty protection.⁵³⁶

273. Similarly, in *Pope & Talbot* the tribunal indicated that a complete negotiating history—which, despite its requests, was not provided by Canada until the damages

⁵³³ *Methanex (Final Award)*, at Part II, Chpt. H, para. 24.

⁵³⁴ *Aguas del Tunari*, at para. 284.

⁵³⁵ *Amco (Annulment)*, at para. 33.

⁵³⁶ *AAP*, at para. 51. As to the usefulness of preparatory work, see also *Tokios (Jurisdiction)*, at para. 52.

phase—would have assisted it to ‘reach a fully informed conclusion’ and that having such documentation would have made its task of interpretation ‘less difficult and more focused on the issues before it’.⁵³⁷

274. Moreover, in *Malaysian Historical Salvors (Annulment)* the ad hoc Committee considered a reason why the tribunal manifestly exceeded its powers in the original award was that ‘it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the *travaux* in key respects’.⁵³⁸

275. Not only have FIATs resorted to preparatory work to interpret treaties, they have also found it useful to examine the relevant preparatory work of instruments that do not constitute treaties. This technique was adopted in the *Methanex* case to interpret the UNCITRAL Arbitration Rules⁵³⁹ and by the *ad hoc* Committee in *CAA-Vivendi* to interpret the ICSID Rules.⁵⁴⁰

276. A rare instance of a reference to the circumstances of a treaty’s conclusion was made in *Plama*:

It may be mentioned here (see also Article 32 of the Vienna Convention) that the parties to the present arbitration have not produced preparatory work of the Bulgaria-Cyprus BIT. They did provide some indication of the *circumstances surrounding its conclusion*. At that time, Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions.⁵⁴¹

277. These circumstances formed part of the basis for the tribunal’s determination that ‘at the time of conclusion, Bulgaria and Cyprus limited specific investor-state

⁵³⁷ *Pope & Talbot (Damages)*, at paras. 39 and 43.

⁵³⁸ *Malaysian Historical Salvors (Annulment)*, at para. 80.

⁵³⁹ *Methanex (Amicus Decision)*, at paras. 26 and 41.

⁵⁴⁰ *CAA-Vivendi (Challenge)*, at para. 9. See also Dr. El Mahdi’s Dissenting Opinion in *SPP (Jurisdiction)*, at 176, para. 26 (referring to the use of preparatory work to interpret domestic Egyptian law).

⁵⁴¹ *Plama (Jurisdiction)*, at para. 196 (emphasis added).

dispute settlement to the provisions set forth in the BIT and had no intention of extending those provisions through the MFN provision'.⁵⁴²

C. CONFIRMING A MEANING

278. The use of Article 32 simply to confirm a meaning underlines the subsidiary nature of that provision. The ICJ applied this approach in the *Libya v Chad* case, where it stated that it was not necessary to refer to the preparatory work to determine the meaning of a treaty in dispute but nonetheless referred to it to confirm its reading of the text.⁵⁴³ Often there appears to be an obligation on the part of the tribunal to examine the preparatory work in addition to its Article 31 analysis simply because it has been relied on in the pleadings of one or both of the parties.⁵⁴⁴

279. FIATs have frequently displayed a willingness to refer to the respective drafting or negotiating history (particularly in connection with the ICSID Convention) to confirm the interpretation of a treaty text.⁵⁴⁵ Likewise, FIATs have found their

⁵⁴² *Plama (Jurisdiction)*, at para. 197. See also the reference to the circumstances at the conclusion of a domestic law on foreign investment in *Tradex (Jurisdiction)*, at 67.

⁵⁴³ *Territorial Dispute (Libya v Chad)*, Merits, ICJ Reports 6 (1994), at 27-28, para. 55. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain), Jurisdiction and Admissibility, ICJ Reports 6 (1995), which raised the interesting question of what must be done if the preparatory work did not confirm but contradicted the meaning arrived at using Article 31. In this regard, see Schwebel, 'May Preparatory Work Be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?', in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), 541-547.

⁵⁴⁴ See Aust, *supra* note 4, at 197 ('the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it'). See also the comment made by Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 *Recueil des cours* 1 (1978), at p. 47, in respect of the ICJ's practice has relevance for FIAT practice:

the State litigants before the Court often examine exhaustively the preparatory work. Naturally, the Court cannot leave without reply[ing to] the arguments based on such examination and has often declared that the *travaux préparatoires* when examined, confirm or support the view that the Court had independently arrived at on the basis of intrinsic materials.

⁵⁴⁵ See, e.g., *Amco (Annulment)*, at para. 22; *Amco (Resubmitted Case on Jurisdiction)*, at 552 (referring to a proposal of State representatives during drafting of Article 51 of the ICSID Convention and the Chairman's response); *SPP (Jurisdiction)*, at para. 59 (referring to an ICSID Convention working paper in the form of a draft convention prepared by the General Counsel and transmitted to the Executive Directors, *History of the ICSID Convention*, Vol. II(1), at 23 and a preliminary draft of the ICSID Convention and working paper prepared by the International Bank for Reconstruction and Development

interpretations have been ‘supported’ by the drafting history⁵⁴⁶ or ‘consistent’ with it.⁵⁴⁷

D. DETERMINING A MEANING

280. The ability to utilise supplementary means of interpretation in order to *determine* the meaning of a treaty is controlled by the criteria set out in Article 32(a) and (b). This process constitutes an exception to the general framework of the Vienna Convention Rules under which Article 31 criteria ordinarily determine the interpretation. This determinative function of Article 32 may be applied only if an application of Article 31 results in an unsatisfactory outcome that leaves the meaning of the text interpreted ‘ambiguous or obscure’ (Article 32(a)) or ‘it leads to a result which is manifestly absurd or unreasonable’ (Article 32(b)).⁵⁴⁸

1. *Ambiguous or Obscure Meaning*

a) International Law Practice

281. The ILC explained that Article 32(a) admits the use of supplementary means of interpretation ‘for the purpose of deciding the meaning in cases where there is no clear meaning.’⁵⁴⁹ No more guidance as to that provision was provided by the ILC.

for the consultative meetings of legal experts, *ibid.*, at 219-20); *MINE (Annulment)*, at para. 5.10 (referring to voting of the committee of legal experts); *CAA (Award)*, at para. 52 (referring to statements from delegations to the negotiation of ICSID Convention); *Maffezini (Jurisdiction)*, at 408, para. 57; *Wena Hotels (Annulment)*, at para. 40; *Vacuum Salt*, at para. 29, n. 9 and para. 43; *Sempra Energy (Jurisdiction)*, at para. 142; *Camuzzi*, at para. 134; *Klöckner (Award)*, at 15; and *Fedax*, at para. 24. As to confirming the interpretation of a BIT, see *Aguas del Tunari*, at para. 266. See also *Tokios (Jurisdiction)*, at para. 52 (‘we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources’).

⁵⁴⁶ See, e.g., *SGS v Philippines*, at para. 146; *Vivendi (Annulment)*, para. 69; and *Amco (Annulment)*, at para. 22.

⁵⁴⁷ See, e.g., *Vacuum Salt*, at para. 37.

⁵⁴⁸ It has been suggested that even if the ordinary meaning is clear, but the preparatory work indicates that this ordinary meaning was not the intention of the parties, recourse to the preparatory work should be had to ‘correct’ the ordinary meaning. See Schwebel, ‘May Preparatory Work Be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?’, in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), 541-547.

⁵⁴⁹ *YILC* (1966-II), at 223, para. 19.

Moreover, the text of the article itself (particularly when compared with the ‘manifest’ requirement found in Article 32(b)) fails to indicate the requisite degree of ambiguity or obscurity. Care must be exercised not to set the requisite degree too low—a consequence might be that minor disagreements as to the meaning of terms may provide sufficient reason to resort to Article 32(b).⁵⁵⁰ If this position were correct, it would render meaningless the hierarchical differences between Article 31 and 32.

282. An illustrative application of the rule underlying Article 32(a) was made by Judge Fitzmaurice in the *Expenses* case where he stated

there is a sufficient element of ambiguity about the exact intention and effect of Article 17, paragraph 2 [of the UN Charter] to make its interpretation on the basis of the rule of the ‘natural and ordinary meaning’ alone, unsatisfactory. In these circumstances it is permissible to have recourse to the preparatory work of the San Francisco Conference.⁵⁵¹

283. This passage’s reference to a ‘sufficient element of ambiguity’ suggests a requisite degree of ambiguity that is not extraordinarily high. Similarly, given that 32(b) is qualified by the term ‘manifest’, the absence of such a qualifier in Article 32(a) also suggests that the latter provision’s standard may, at the least, be lower than one that is ‘manifest’.

b) FIAT Practice

284. The *Methanex* tribunal has cast some light on the standard of ambiguity or obscurity needed before recourse may be had to supplementary means of interpretation. It held that ‘notwithstanding the existence of various possible interpretations’ of the provision in question, the claimant was required to show it was ‘*demonstrably* ambiguous or obscure’.⁵⁵²

⁵⁵⁰ See, e.g., Sinclair, *supra* note 6, at 142.

⁵⁵¹ ICJ Reports (1962), at 209. As to other ICJ jurisprudence on the effect of ambiguity in texts, see *Temple* case, ICJ Reports (1961), at 33-4 (‘If ... there should appear to be a contradiction between [specified provisions]—then, according to a long-established jurisprudence, the Court becomes entitled to go outside the terms of the Declaration in order to resolve this contradiction’).

⁵⁵² *Methanex (Final Award)*, at Part II, Chpt. H, para. 24 (emphasis added).

285. Also of interest to note in this section is the Cable Television award. In that decision, the tribunal looked at the relevant antecedent drafts of Article 25(1) of the ICSID Convention not to ‘determine’ or ‘confirm’ the meaning of that provision but ‘[i]n order to better understand the meaning and significance’ of the words ‘constituent subdivision or agency’ contained in that provision.⁵⁵³ Its analysis of the preparatory work played a large role in its decision.

2. *Manifestly Absurd or Unreasonable Result*

a) International Law Practice

286. The second type of circumstance that permits the use of the supplementary means of interpretation to *determine* a meaning is limited to cases in which Article 31 leads to a ‘manifestly absurd or unreasonable’ interpretation. In contrast to Article 32(a), the requisite standard contained in Article 32(b) is explicit—it must be manifest. A straightforward example of a manifestly absurd interpretation is a situation in which an interpretation of a dispute settlement clause finds that the clause compels a State to submit its claim to a defunct court.⁵⁵⁴

287. The ILC’s intention to set a high threshold for use of supplementary means of interpretation in cases where the ordinary meaning led to absurd or unreasonable conclusions was explained in its commentary:

The Commission considered that the exception must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms. Sub-paragraph (b) is accordingly confined to cases where interpretation under article 27 gives a result which is manifestly absurd or unreasonable.⁵⁵⁵

288. Waldock, in his Third Report, observed ‘[t]he limited nature of this exception is confirmed by the rarity of the cases in which the Court has applied it’.⁵⁵⁶ It may be

⁵⁵³ *Cable Television*, at para. 2.31.

⁵⁵⁴ See, e.g., the *Temple* case, Preliminary Objections, ICJ Reports 17 (1961), at 32-33.

⁵⁵⁵ *YILC* (1966-II), at 223, para. 19.

⁵⁵⁶ Waldock III, at 57.

said that the rule is based on a high degree of common sense as it would be disconcerting for tribunals to be permitted to attribute to parties an intention that is exceedingly illogical or impractical to perform.

b) FIAT Practice

289. The instances in which Article 32(b) has been employed by FIATs to determine the meaning of treaty provisions—similar to the application of the provision in international law—is rare. Most awards referring to absurd or unreasonable results do not do so as a factor justifying recourse to supplementary means of interpretation to determine an interpretation. Generally, they identify what they consider to be an absurd or unreasonable interpretation and then—rather than use this as a trigger to apply Articles 32(b)—simply proceed not to follow such an interpretation.⁵⁵⁷ In *American Manufacturing*, for example, the tribunal indicated that the interpretation of a BIT asserted by Zaire ‘would lead to an absurd result and an unacceptable fact’ and held that Zaire’s interpretation was untenable.⁵⁵⁸

290. In *LANCO*, the tribunal appeared to consider that an interpretation of Article VII (2) of the Argentina-US BIT would be absurd if it were to hold that the dispute settlement procedure chose

the jurisdiction of courts whose own jurisdictions are, by law, not subject to agreement or waiver, whether territorially, objectively, or functionally. As the contentious-administrative jurisdiction cannot be selected or waived, submission to the contentious-administrative tribunals cannot be understood as a previously agreed dispute-settlement procedure.⁵⁵⁹

⁵⁵⁷ These interpretations may be confined to interpretations in which those absurd or unreasonable interpretations were considered as being inconsistent with the Article 31 good faith, ordinary meaning and object and purpose criteria.

⁵⁵⁸ *American Manufacturing (Award)*, at para. 5.36. See also *Pope & Talbot (Merits)*, at paras. 117-118; and *Enron (Jurisdiction)*, at para. 42.

⁵⁵⁹ *Lanco*, at para. 26.

291. But, again, it did not use this finding to employ supplementary means of interpretation as provided for in Article 32(b). The *Champion Trading Company* tribunal referred to that provision in the following manner:

According to Article 31 of the Vienna Convention of 23 May 1969, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in the light of their object and purpose.

According to the ordinary meaning of the terms of the Convention (Article 25(2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national. This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, Article (32)(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state.⁵⁶⁰

292. This passage does not appear to apply Article 32(b) correctly. The reference to that provision suggests that its function is to prohibit or otherwise discourage interpretations that are manifestly absurd or unreasonable. As noted above, the function of Article 32(b) is to permit use of supplementary means of interpretation to determine a meaning where ambiguity or unreasonableness is present after application of Article 31.

⁵⁶⁰ *Champion Trading (Jurisdiction)*, 19 ICSID Review, at p. 288. See also a similar type of reference to Article 32(b) in *Vacuum Salt*, at 338, para. 29, n. 9.

Chapter V

OTHER MEANS OF INTERPRETATION

Chapter outline: This Chapter concerns techniques of treaty interpretation that are not specifically mentioned in the Vienna Convention Rules. Subsequent to a general introduction in Section A, the Chapter examines how the treaty interpretation process utilises international court decisions and arbitral awards (Section B), treaties or international instruments (Section C), scholarly opinion (Section D), the principle of effectiveness (Section F) and legal maxims (Section G). Section E deals briefly with inter-temporal aspects relevant to treaty interpretation.

A. INTRODUCTION

293. All major criteria expressly referred to in Articles 31 and 32 of the Vienna Convention have been discussed in Chapters III and IV. Any comprehensive study of treaty interpretation, however, cannot end there. A number of other techniques are frequently used by international courts and tribunals to interpret treaties. As was seen in Chapter IV, Article 32 specifies two examples of ‘supplementary means of interpretation’—the preparatory work and circumstances surrounding the treaty’s conclusion. But Article 32 does not provide an exhaustive list. Moreover, as Sinclair has accurately remarked:

few would seek to argue that the rules embodied in Articles 31 to 33 of the [Vienna Convention] are exhaustive of the techniques which may be properly adopted by the interpreter in giving effect to the broad guidelines laid down in those rules. ... there are

many other principles of logic or of common sense which might have been included if the intention had been to draw up a comprehensive catalogue of all those aids to interpretation which have from time to time, and depending upon the circumstances of the particular case, been invoked by international tribunals.⁵⁶¹

294. A number of these alternate techniques of interpretation, whether or not they strictly fall within the scope of Article 32 and whether or not they constitute mere rules of logic or applications of common sense, will be discussed (in no particular order of importance) in this section.

B. COURT DECISIONS AND ARBITRAL AWARDS

a) International Law Practice

295. A prominent feature of international law is that it contains no system of binding precedent or *stare decisis*.⁵⁶² Article 59 of the Statute of the ICJ provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. Nonetheless, the Court speaks of its 'settled jurisprudence'⁵⁶³ and Article 38(1)(d) classifies 'judicial decisions' as a 'subsidiary means for the determination of rules of law'.

⁵⁶¹ Sinclair, *supra* note 6, at 153. See also Gardiner, *Treaty Interpretation* (2008), at 6 (commenting that the Vienna Convention Rules are not 'an exclusive compilation of guidance on treaty interpretation, other skills and principles that are used to achieve a reasoned interpretation remaining admissible to the extent not in conflict with the [Vienna Convention Rules]').

⁵⁶² See, e.g., Shahabuddeen, *Precedent in the World Court* (1996), at 97; and Bernhardt, 'Article 59', in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 1231 (2006), at 1244.

⁵⁶³ See *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports (1980), at 18, para. 33; and *Interpretation of WHO-Egypt Agreement*, ICJ Reports (1980), at 87, para. 33. Judge Shahabuddeen observed in his Lauterpacht Lectures that the Court's jurisprudence 'has developed in the direction of a strong tendency to adhere closely to previous holdings.' Shahabuddeen, *Precedent in the World Court* (1996), at 238.

296. Shabtai Rosenne has commented that the ICJ refers to its earlier decisions ‘not so much in the quality of binding precedent [but] as having persuasive influence’.⁵⁶⁴ Also relevant is Rudolf Bernhardt’s summary of ICJ practice:

The ICJ, like every court, hesitates to overrule former pronouncements; quite to the contrary, it often refers to previous decisions and to reasons developed in such decisions, whether these reasons have been essential for that decision or are only *obiter dicta*. In many judgments of the ICJ, the Court quotes extensively its own pronouncements in former cases with different parties. Even advisory opinions, which are formally not binding for any State or even for the international organ having requested the opinion, are often quoted in later advisory opinions and judgments.⁵⁶⁵

297. In the *Land and Maritime Boundary* case, the ICJ made clear that Nigeria was not bound by decisions reached by the Court in previous cases. In its view, nevertheless, the real question was whether ‘there is cause not to follow the reasoning and conclusions of earlier cases’.⁵⁶⁶

298. Before proceeding to examine FIAT practice, it is worth noting a distinction between the practice of the ICJ and FIATs is that the former is a permanent body, while the latter are *ad hoc* arbitral tribunals. Consequently, when the ICJ considers prior ICJ decisions, it is considering its own decisions. In contrast, when FIATs consider past FIAT decisions, they are considering decisions made by other arbitral tribunals. Furthermore, variance in the quality of FIAT awards would be expected to be greater than that found among ICJ decisions. This difference may be ascribed to the *ad hoc* and permanent nature of, respectively, FIATs and the ICJ.

⁵⁶⁴ Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume III, Procedure* (2006), at 1553. A similar respect for prior decisions is held by the WTO Appellate Body. As an example, it stated in the *Shrimp Turtle II* case that ‘[a]dopted panel reports are an important part of the GATT acquis ... They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.’ *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, 12 October 1998, WT/DS58/AB/R, at para. 108.

⁵⁶⁵ Bernhardt, ‘Article 59’, in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 1231 (2006), at 1244.

⁵⁶⁶ ICJ Reports 275 (1998), at 292, para. 28.

b) FIAT Practice

299. As a preliminary matter, it is of benefit to digress slightly and consider whether prior judicial or arbitral decisions constitute a ‘source’ of international law. *Sempra Energy* is notable for observing that

interpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions as a *source of international law* in Article 38(1) of the Statute of the International Court of Justice, to which the Respondent refers.⁵⁶⁷

300. This statement calls for clarification. Article 38(1)(d) provides that the ICJ is to apply ‘judicial decisions ... as a subsidiary means for the determination of rules of law’. Alain Pellet’s insightful view on this provision is that:

jurisprudence and doctrine are not sources *of law*—or, for that matter, of rights and obligations for the contesting States; they are *documentary* ‘sources’ indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs [i.e., Article 38(1)(a), (b) and (c)] ... strictly speaking, the Court does not ‘apply’ those ‘means’, which are only tools which it is invited to use in order to investigate the three sources listed above.⁵⁶⁸

301. In the light of this (correct) reading of Article 38(1) of the ICJ Statute, the *Methanex* tribunal’s approach is to be preferred to that taken in *Sempra Energy* extracted above. The *Methanex* tribunal commented that while prior NAFTA awards were neither ‘sources of law’ nor ‘legally binding’, the claimant was ‘entitled to adopt their legal reasoning as part of its case’.⁵⁶⁹

⁵⁶⁷ *Sempra Energy (Jurisdiction)*, at para. 147 (emphasis added).

⁵⁶⁸ Pellet, ‘Article 38’, in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 677 (2006), at 784. However, one cannot underestimate the role of judicial or arbitral decisions in shaping international law. As Professor Shaw observes, many decisions of international arbitral awards ‘have been extremely significant in the development of international law’. Malcolm Shaw, *International Law* (2003), at 104. See also Pellet, *ibid.*, at 789-790 (citing instances of ‘the deep influence that the [ICJ] has exercised on the evolution of international law’).

⁵⁶⁹ *Methanex (Partial Award)*, at para. 141. See also *Enron (Jurisdiction)*, at para. 40 (‘decisions of ICSID or other arbitral tribunals are not a primary source of rules’).

302. We return now to the role prior decisions play in interpreting treaties.⁵⁷⁰ From an historical viewpoint, a sea change has taken place in investment treaty arbitration since Christoph Schreuer observed in 2001 that ICSID award references to prior ICSID awards were scant due to ‘their relatively small number and the difficulty in gaining access to them’.⁵⁷¹ But since then, the once gentle stream of FIAT awards has transformed into a torrent. By 2007, for example, Jeffrey Commission’s study of precedent in foreign investment arbitration examined 207 publicly accessible investment arbitration decisions and awards.⁵⁷² The numbers of newly published FIAT awards presently increase almost on a weekly basis.

303. Similar to Article 59 of the ICJ Statute, an ICSID award by virtue of Article 53(1) binds only the parties to an arbitration.⁵⁷³ This provision was characterised by the *SGS v Philippines* tribunal as one ‘which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases’.⁵⁷⁴

304. The *El Paso* tribunal said this about the significance of prior awards:

ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present

⁵⁷⁰ For a well researched breakdown of how ICSID tribunals have used other FIAT decisions during the process of treaty interpretation, see Fauchald, *supra* note 11, at 335-341.

⁵⁷¹ Schreuer, *supra* note 5, at 617.

⁵⁷² See Commission, ‘Precedent in Investment Treaty Arbitration’, 24 *Journal of International Arbitration* 129 (2007), at 133.

⁵⁷³ In *Methanex (Amicus Decision)*, at para. 51, the claimant argued that by interpreting Article 15(1) of the UNCITRAL Arbitration Rules to permit the acceptance of *amicus* submissions, the tribunal would be setting a precedent for other tribunals. The response of the tribunal was to state that it ‘can set no legal precedent, in general or at all. It has no power to determine for other arbitration tribunals how to interpret Article 15(1)’.

⁵⁷⁴ See *SGS v Philippines*, at para. 97. See also *AES*, at para. 23(d); and *Enron (Jurisdiction) (Ancillary Claim)*, at paras. 25-26.

Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.⁵⁷⁵

305. More recently, consistency in FIAT decision-making has been emphasized by the *Saipem v Bangladesh* tribunal:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it *must* pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a *duty* to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a *duty* to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁵⁷⁶

306. The adoption of strong words such as ‘must’ and ‘duty’ in the above passage indicate a strong preference by this tribunal to show deference to other tribunals and align their decisions accordingly. In contrast, a more circumspect view was taken in *SGS v Philippines*:

although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in

⁵⁷⁵ *El Paso*, at 39. See also *Amco (Jurisdiction)*, at para. 14; *Bayindir*, at para. 76; and *AES (Jurisdiction)*, at paras. 30-32. As to NAFTA cases, see, e.g., *Waste Management*, Dissenting Opinion of Keith Hight, introductory (unnumbered) paragraph ([t]he precedential significance of this Award for future proceedings under the North American Free Trade Agreement (NAFTA) cannot be underestimated’); and *Methanex (Partial Award)*, at para. 141. Correspondingly, a prior tribunal’s rejection of interpretations submitted by a party may also influence subsequent tribunals. See, e.g., *Sempra Energy (Jurisdiction)*, at para. 145.

⁵⁷⁶ *Saipem (Jurisdiction)*, at para. 67 (emphasis added). The identical words were repeated by the *Saipem (Award)*, at para. 90. Very similar words were used in *Duke v Ecuador*, at para. 117. See also *ADC*, at para. 293 (‘cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States’); and Thomas W. Wälde, ‘Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues’, 1 *Transnational Dispute Management* (2004), Issue 1 (‘The reasoning of almost all modern arbitral awards demonstrate the great care investment arbitral tribunals apply to ensure they are positioned in the mainstream of emerging jurisprudence. While there is no formal “stare decisis” rule, there is a de facto and very strong pressure on each tribunal to heed what other tribunals have done with identical or very similar legal language. This does not necessarily prevent contradictory awards ...’); and Lowenfeld, ‘Investment Agreements and International Law’, 42 *Columbia Journal of Transnational Law* 123 (2003-2004), at 128 (‘[b]ut since so many of the recent treaties are so much alike, it is proper in a BIT case for arbitrators who are called upon to construe terms such as “fair and equitable treatment,” “adequate compensation,” or “equal access” to draw on the awards in similar disputes under similar treaties’).

international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.⁵⁷⁷

307. These words set the stage for this tribunal's now famous decision in which it declined to follow the *SGS v Pakistan* tribunal's interpretation of an umbrella clause similar to that which was at issue in *SGS v Philippines*.⁵⁷⁸

308. The question whether prior decisions should be followed represents an important question in investment treaty arbitration because FIATs frequently interpret treaty provisions that are identical or similar to those already interpreted by other FIATs.⁵⁷⁹ Indeed, there have been times where the different claimants in parallel arbitrations have been seeking rights against the same host State, under the same BIT and in respect of the same provisions of that BIT.⁵⁸⁰ The absence of any precedential effect of FIAT awards thus leaves considerable room for inconsistency in decision making among FIATs, including in the interpretation of treaties.⁵⁸¹

⁵⁷⁷ *SGS v Philippines*, at para. 97 (footnotes omitted).

⁵⁷⁸ This, however, did not mean to say that the *SGS v Philippines* tribunal disagreed with all aspects of the *SGS v Pakistan* award. See, e.g., *SGS v Philippines*, at paras. 111 and 157.

⁵⁷⁹ See, e.g., *Azurix (Jurisdiction)*, at para. 73 (the tribunal held it 'concurs with the decisions of tribunals that have interpreted the same provision in the same BIT or similar provisions in other BITs to which Respondent is a party'); *LG&E (Jurisdiction)*, at para. 74; and *Lanco*, at para. 43. See also Kaufmann-Kohler, 'Interpretation of Treaties: How do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?', in Mistelis, L.A. and Lew, J.D.M., *Pervasive Problems in International Arbitration* 256 (2006), at 258 (observing that 'all investment treaties protect investments by granting investors rights which are materially identical or comparable').

⁵⁸⁰ See, e.g., *AES*, *Azurix*, *LG&E*, *Enron*, *CMS*, and *Lanco* arbitrations, which all invoked the 1991 Argentina-US BIT. In this regard, see particularly *AES*, at para. 29.

⁵⁸¹ For a detailed discussion on prominent FIAT cases that have not followed prior FIAT awards on the same or similar provisions, see Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Review* 1521 (2004). See also Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?', in Ortino, Sheppard and Warner (eds.), *Investment Treaty Law: Current Issues Volume I* 23 (2006), at 27 (inconsistent decisions in investment arbitration is no means unique, 'domestic courts reach inconsistent decisions on a regular basis ... the thousands of domestic, consumer and industry-specific arbitrations undoubtedly give rise to inconsistent decisions from time to time').

309. Notwithstanding this potential for inconsistent decisions, the bulk of FIAT practice demonstrates that prior FIAT decisions have a significant degree of influence on subsequent FIAT interpretations of foreign investment treaties. For example, it is commonplace for ICSID tribunals to refer to other ICSID tribunal awards to confirm or support their interpretation or application of a treaty, particularly in relation to the interpretation of the ICSID Convention.⁵⁸² Concerning the interpretation of the ECT, Thomas Wälde and Todd Weiler have commented '[t]he awards made by tribunals articulating the meaning of BITs, ICSID clauses, and NAFTA provisions can ... be expected to have a notable influence on the interpretation of the language of the ECT.'⁵⁸³

310. One of the most important results in the Fauchald empirical analysis was the finding that prior case law was used in the interpretative process in 92 of the 98 decisions subject to that study.⁵⁸⁴ Other examinations of FIAT awards also indicate an evolving form of precedent (though not in the common law sense) in investment arbitration.⁵⁸⁵ Thomas Wälde has gone so far as to contend that

⁵⁸² See, e.g., *Amco (Annulment)*, at para. 22 and 44; *CMS (Jurisdiction)*, at paras. 70-76; *Vacuum Salt*, at 337, para. 29, n. 9; *Lanco*, at para. 46; *LG&E*, at paras. 77-8; *Vivendi (Jurisdiction)*, at para. 94; *Bayindir*, at paras. 96, 98, 102 and 128; *Olguín (Jurisdiction)*, at para 26; *Eureko*, at para. 186; *Gas Natural*, at para. 39; *Azurix (Jurisdiction)*, at para. 73; *AES*, at paras. 30 and 32; and *Tokios (Jurisdiction)*, at para. 91. By way of interest, a glimpse of the extent to which some tribunals cite other ICSID cases is provided by a perusal of the endnotes in *Enron (Ancillary Claim)*. See also Schreuer, *supra* note 5, at 617 (noting that the early years of the ICSID Convention, references to ICSID decisions was scant due to 'their relatively small number and the difficulty in gaining access to them').

⁵⁸³ Wälde and Weiler, *supra* note 62, at 166 (footnote omitted).

⁵⁸⁴ Fauchald, *supra* note 11, at 335.

⁵⁸⁵ See, e.g., Commission, 'Precedent in Investment Treaty Arbitration', 24 *Journal of International Arbitration* 129 (2007), at 158 ('The role that precedent has come to play in investment treaty arbitration today resembles the common law doctrine of *stare decisis* absent certain of the associated values advanced in a common law system of precedent.');

Cheng, 'Precedent and Control in Investment Treaty Arbitration', 30 *Fordham International Law Journal* 1014 (2007), at 1044 (concluding on the basis of examined FIAT decision trends that a credible hypothesis may be made that 'in spite the absence of rules of precedent in investment treaty arbitration, there is a strong—albeit imperfect and informal—norm of accounting for prior relevant awards and providing reasons for following or departing from those awards.');

and Schreuer and Weiniger, 'A Doctrine of Precedent?', in Muchlinski, Ortino and Schreuer, *The Oxford Handbook of International Investment Law* (2008), 1188, at 1196 ('a *de facto* practice of precedent certainly exists. However, it is not identical to that prevailing within domestic common law systems').

tribunals which deviate from established jurisprudence, without an extensive effort at reasoning, distinction and providing a full hearing to the parties on their intention to deviate, might be considered to commit severe procedural and material rule breaches that could bring them into the visor of the—limited—procedures for judicial review and annulment.⁵⁸⁶

311. In the context of the ICSID system, an award would have to be rather extreme for it to be annulled on the basis that it has not considered established jurisprudence. No annulment by an *ad hoc* Committee has yet been made on such a basis.

312. In many cases, FIATs consider the prior awards of other FIATs in large part because heavy reliance is placed on these decisions in the parties' pleadings.⁵⁸⁷ This practice is evident in the following passage in the *Feldman* award:

in view of the fact that both parties in this proceeding have extensively cited and relied upon some of the earlier decisions [of NAFTA tribunals], the Tribunal believes it appropriate to discuss briefly relevant aspects of earlier decisions ...⁵⁸⁸

313. A discernible practice associated with FIAT reference to prior awards is that it is rare for distinctions to be made between the *ratio decidendi* and *obiter dicta*.⁵⁸⁹ As a consequence, FIATs typically give the same weight to statements of prior FIATs whether or not they constitute *ratio decidendi* or *obiter dicta*. Jeffrey Commission has contended that '[a] continued failure to distinguish between the *ratio decidendi* and *obiter dicta* of prior awards and decisions could threaten the integrity of the tribunals and legitimacy of the investment treaty system itself.'⁵⁹⁰ It remains to be seen whether the system will be jeopardised in such a fashion.

⁵⁸⁶ Wälde, 'The Specific Nature of Investment Arbitration', in Kahn and Wälde (eds.), *New Aspects of International Investment Law* 43 (2007), at 105-106.

⁵⁸⁷ See, e.g., *Renta 4*, at para. 16; *Plama (Jurisdiction)*, at para. 210; *Mitchell (Enforcement Stay)*, at para. 23; *El Paso*, at para. 39; *Enron (Jurisdiction) (Ancillary Claim)*, paras. 33; *Bayindir*, at paras. 73-6; and *Azurix (Jurisdiction)*, at para. 73.

⁵⁸⁸ *Feldman (Award)*, at para. 107.

⁵⁸⁹ See particularly *Amco (Annulment)*, at para. 44. See also Fauchald, *supra* note 11, at 335. But see *Loewen (Jurisdiction)*, at para. 49 (reference to the *ratio*); and *Renta 4*, at paras. 23 and 95 (reference to *obiter*).

⁵⁹⁰ Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence', 24 *Journal of International Arbitration* 129 (2007), at 156.

314. The reasons FIATs have employed to justify following or giving weight to prior FIAT decisions (for interpreting treaties and other decisional purposes) include considerations as to whether the prior decision appeared to be:

- a) convincing or persuasive;⁵⁹¹
- b) ‘well founded’;⁵⁹²
- c) ‘instructive’;⁵⁹³
- d) ‘in harmony with applicable international jurisprudence’;⁵⁹⁴
- e) a shared view;⁵⁹⁵
- f) involving ‘similar circumstances’ or a ‘high level of similarity’;⁵⁹⁶
- g) ‘correct’;⁵⁹⁷ and
- h) ‘appropriate’.⁵⁹⁸

315. FIATs occasionally refer to other decisions simply to confirm their own decision.⁵⁹⁹ FIATs also have had regard to (1) the development of an ‘accepted

⁵⁹¹ *Mitchell (Enforcement Stay)*, at para. 23; *Metalclad (Award)*, at para. 108; and *Methanex (Partial Award)*, at Part II, Chpt. B, para. 6 (‘the Tribunal may remain open to persuasion based on legal reasoning developed in the GATT and WTO jurisprudence’).

⁵⁹² *Amco (Annulment)*, at para. 44.

⁵⁹³ *LETCO (Award)*, 2 ICSID Reports 346, at 352.

⁵⁹⁴ *Amco (Annulment)*, at para. 44.

⁵⁹⁵ *AES (Jurisdiction)*, at para. 30.

⁵⁹⁶ *AES (Jurisdiction)*, at para. 28 (‘if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals’); and *Mitchell (Enforcement Stay)*, at para. 23.

⁵⁹⁷ *Enron (Jurisdiction)*, at para. 40.

⁵⁹⁸ *Bayindir*, at 76 (finding that ‘it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate’); and *Plama (Jurisdiction)*, at para. 218.

⁵⁹⁹ *Gas Natural (Jurisdiction)*, at paras. 36 and 52.

meaning' of a term through authoritative definition in ICJ judgments⁶⁰⁰ and (2) an 'overwhelming weight of [ICSID] authority' that points toward a certain interpretation of the ICSID Convention.⁶⁰¹ The above justifications for reliance or finding support in prior decisions enhance the uniformity, predictability and authority of the FIAT decision making process.⁶⁰²

316. Despite the numerous cases that demonstrate a good degree of respect is shown toward prior FIAT decisions, a number of FIATs have been reluctant to adopt the interpretation of other FIATs too readily. The most prevalent reasons why other FIAT decisions are not followed or are not given great weight is that the antecedent case involved different facts, background, negotiating histories or circumstances.⁶⁰³ For example, in the *Enron* proceedings, Argentina urged the tribunal to be consistent with the interpretation of Article 25 of the ICSID Convention made in *Vacuum Salt*. Among its reasons for rejecting this submission, the tribunal stressed that *Vacuum Salt* 'was an entirely different case not comparable in any way with this one'.⁶⁰⁴ In the *AES* arbitration, the tribunal agreed with the following submission by Argentina:

Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.⁶⁰⁵

⁶⁰⁰ *Lucchetti (Award)*, at para. 48.

⁶⁰¹ *Tokios (Jurisdiction)*, at para. 42.

⁶⁰² See Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3(2) *Transnational Dispute Management* (2006), at 10.

⁶⁰³ See, e.g., *Agua del Tunari*, at para. 288; *Enron (Jurisdiction) (Ancillary Claim)*, at paras. 35 and 43-45; *Plama (Jurisdiction)*, at paras. 210, 211 and 224; *Sempra Energy (Jurisdiction)*, at paras. 145; *Fraport*, Dissenting Opinion of Cremedes, at para. 7; and 155; *SGS v Philippines*, at para. 110. See also the *CME (Final Award)*, at para. 432, where the tribunal stated that although that arbitration and the *Lauder* arbitration concerned the same investment and the respective BITs at issue in each case granted similar investment protections, the bilateral treaties were not identical. As a consequence, *res judicata* was held to be not applicable as between the *CME* and *Lauder* tribunals.

⁶⁰⁴ *Enron (Jurisdiction) (Ancillary Claim)*, at para. 45. See also *Occidental Exploration (Award)*, at para. 57 ('what ultimately matters is that every solution must respond to the specific circumstances of the dispute submitted and the nature of such dispute'); and *Canadian Cattlemen*, at para. 209.

⁶⁰⁵ Quoted in *AES (Jurisdiction)*, at para. 22. See also Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3(2) *Transnational Dispute Management* (2006), at 15 ('an application for annulment that alleges an excess of powers or a failure to state reasons because the

317. The risks associated with use of awards as precedents have led Thomas Wälde and Todd Weiler to comment:

one should never assume an automatic precedential effect on any individual tribunal award. Modern investment treaties have many commonalities and their text is mostly derived from previous treaties, but there are often substantial differences – particular [*sic.*] in terms of reservations and exceptions, but also in structure and the ‘fine print’ of the relevant text. One needs therefore to find a balance between common and emerging trends in interpretation, without failing to give sufficient counterweight to the peculiarities of the text, context and purpose of a particular treaty such as the NAFTA, ECT or bilateral treaties.⁶⁰⁶

318. FIAT discussions of antecedent awards may also not provide a sufficiently conclusive answer on a point.⁶⁰⁷ Likewise, the evidence submitted in the prior case may raise doubts about the assistance that prior case may provide, as the *Aguas del Tunari* case demonstrates. Both parties there referred to various ICSID cases in their submissions as to the meaning of ‘control’ in Article 25(2)(b) of the ICSID Convention. The *Aguas del Tunari* tribunal was unsure as to what evidence had been filed in these prior cases and to what extent the respective tribunals considered this evidence. Consequently, it took the view that ‘[w]ithout access to the full records of these cases, the Tribunal does not believe it possible to assess their significance for the present arbitration’.⁶⁰⁸

319. The caution expressed by the *Plama* tribunal as to an unquestioning acceptance of authority created by ‘string citation’ is also pertinent:

Actually, the *Siemens* decision illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question: the principle is retained in the form of a ‘string citation’ of principle and the exceptions are relegated to a brief examination, prone to falling soon into oblivion (Decision, at paragraphs 105, 109 and 120).⁶⁰⁹

tribunal has simply relied on earlier decisions without making an independent decision or developing its own reasons is entirely possible.’).

⁶⁰⁶ Wälde and Weiler, *supra* note 62, at 166, n. 19.

⁶⁰⁷ *Plama (Jurisdiction)*, at para. 217.

⁶⁰⁸ *Aguas del Tunari*, at para. 288.

⁶⁰⁹ *Plama (Jurisdiction)*, at para. 226.

320. Furthermore, FIATs have confirmed or supported their interpretation or application of certain treaty provisions by reference to relevant interpretations rendered by a wide range of other international courts and tribunals, in particular the PCIJ,⁶¹⁰ ICJ,⁶¹¹ European Court of Justice,⁶¹² European Court of Human Rights,⁶¹³ Iran-United States Claims Tribunal,⁶¹⁴ and *ad hoc* arbitrations.⁶¹⁵ There have also been several references to World Trade Organisation jurisprudence.⁶¹⁶ In rare instances, references to domestic court decisions have been considered appropriate in a FIATs interpretation of a treaty.⁶¹⁷ No real significance has thus been placed on the

⁶¹⁰ See, e.g., *Klöckner (Annulment)*, paras. 59-61; and *Lucchetti (Award)*, at para. 48. See also Schreuer, *supra* note 5, at 616, n. 233.

⁶¹¹ See, e.g., *Mondev*, at para. 43; *Klöckner (Annulment)*, at paras. 59-61; *Amco (Annulment)*, at paras. 41 and 44; *Lucchetti (Award)*, at para. 48; *Siemens (Jurisdiction)*, at paras. 94-103; *Casado (Provisional Measures)*, at paras. 19-20; and *Plama (Jurisdiction)*, at paras. 213-17. See also Schreuer, *supra* note 5, at 616, n. 233.

⁶¹² *Loewen (Jurisdiction)*, para. 45. See also Schreuer, *supra* note 5, at 616, n. 234.

⁶¹³ See, e.g., *Lauder*, at para. 200; and *SGS v Pakistan*, at para. 171, n. 178. Contrast *Mondev*, at para. 69, n. 17. See also Schreuer, *supra* note 5, at 616, n. 235.

⁶¹⁴ *CME (Partial Award)*, para. 608; *Loewen (Jurisdiction)*, para. 45; *Tokios (Jurisdiction)*, at para. 91; *Casado (Provisional Measures)*, at paras. 22-23. See also Schreuer, *supra* note 5, at 616, n. 236.

⁶¹⁵ *Klöckner (Annulment)*, at paras. 59-61. *AAP*, at para. 40 referred to a number of early international arbitral awards in support of its summation of treaty interpretation rules. See also Schreuer, at *supra* note 5, at 616, n. 236.

⁶¹⁶ WTO references tend to be made more often by NAFTA tribunals than other FIATs. In *Methanex (Partial Award)*, at Part II, Chpt. B, para. 6, the tribunal held that when it comes to interpreting certain provisions of the NAFTA Chapter 11:

the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.

See also *ADF (Award)*, at para. 147; *Pope & Talbot (Merits, Phase 2)*, at para. 46-63; and *SD Myers (Partial Award)*, at paras. 244 and 291. As regards, reference to WTO case law by ICSID tribunals, see *SGS v Pakistan*, at para. 171, n. 178. In *Occidental Exploration (Award)*, at paras. 174-5, a non-NAFTA investment arbitration, WTO case law was distinguished and not followed.

⁶¹⁷ See, e.g., *SD Myers (Partial Award)*, at para. 249, n. 44 (referring to a line of decisions emanating from the Supreme Court of Canada in its interpretation of NAFTA Article 1102 and commenting that '[a]lthough domestic law is not controlling in Chapter 11 disputes, it is not inappropriate to consider how the domestic laws of the parties to the dispute address an issue'); and Dr Asante's Dissenting Opinion in *AAP (Dissenting Opinion)*, at 306 (referring to an English court decision (*Adams v Naylor* (1946) 2 All ER 241) and commenting that the case was 'certainly not binding in this arbitration' but it 'may be instructive'). In contrast, see *Enron (Jurisdiction) (Ancillary Claim)*, at 39, in which the tribunal, in its interpretation of the Argentina-US BIT, was reluctant to rely on the view taken on direct and indirect share ownership in the United States Supreme Court decision in *Dole Food Co. v Patrickson*, 123 S. Ct. 1655 (2003). In *Duke v Ecuador*, at para. 183, reference was made to the

jurisdiction from which an award has been made: the guiding factor appears to be relevance.⁶¹⁸ The tribunal in *Continental Casualty* said the following in its interpretation of Article XI of the Argentina-United States BIT:

Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.⁶¹⁹

321. However, care must be exercised by FIATs not to place too much emphasis on interpretation or practices relating to provisions belonging to other legal regimes. For example, the context of the GATT and WTO trade-related provisions could be significantly different to the context of investment protection provisions in BITs.

322. Concerning the jurisprudential basis for interpretation based on reference to prior cases, in *Canadian Cattlemen* the tribunal took the view that

Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, they must be understood to be also supplementary means of interpretation in the sense of Article 32 of the [Vienna Convention].⁶²⁰

323. This statement fails to take into account the differences between the two provisions. The ICJ Statute refers to judicial decisions as ‘subsidiary means for the determination of rules of law’. As mentioned above, this provision enables judicial decisions (or arbitral awards) to be used to *identify* international law rules. That is distinct from using prior decisions to *interpret* particular provisions of investment treaties, which are of themselves rules of international law as between the treaty parties.⁶²¹ The logic of the *Canadian Cattlemen* award is therefore problematic. This

English Queen’s Bench judgment in *Ecuador v Occidental Exploration & Production Co* (No. 2), [2006] EWHC 345 (Comm).

⁶¹⁸ See also Fauchald, *supra* note 11, at 341-342.

⁶¹⁹ *Continental Casualty (Award)*, at para. 192.

⁶²⁰ *Canadian Cattlemen*, at para. 50.

⁶²¹ See also Orakhelashvili, ‘Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen’, 26 *Journal of International Arbitration* 159 (2009), at 167-168.

is perhaps one reason why it is relatively rare for FIATs to discuss the either the ICJ Statute or Article 32 of the Vienna Convention or both when they refer to past awards when interpreting treaties.

324. To conclude this section, attention is drawn to the research conducted for the present thesis. While not quantitative in nature, the review of awards revealed that the overwhelming majority of FIAT decisions referred to prior decisions in one way or another. This finding is supported by the Fauchald empirical analysis, which as noted above, found that references to case law in interpretative arguments constituted by far the most frequently used mode of interpretation.⁶²² The following observation of Thomas Wälde and Todd Weiler is therefore apposite:

An investment jurisprudence is at present emerging rapidly – perhaps too easily in view of the sometimes significant legal differences between the various treaties underlying the cases. The result of these trends may well be a burgeoning ‘common law’ of international trade and investment protection, where different tribunals work separately, but somehow symbiotically, to articulate the meaning of treaty obligations which share similar, if not identical, language.⁶²³

325. This development in international investment law has parallels with decision trends in international law generally. Chester Brown, for example, has concluded that there is an emerging ‘common law of international adjudication’ involving a practice where the resolution of an issue in one international court or tribunal is often aided by considering how that issue has been dealt with by other international bodies.⁶²⁴ But this practice is not based on a sense of obligation to follow other decisions but, *inter alia*, on similarities in (i) the procedure and remedies to be applied, (ii) the applicable

⁶²² Out of the 98 ICSID decisions analysed in that study, 90 used ICSID case law in their interpretative arguments, and another 30 decisions referred to other tribunal decisions that used the UNCITRAL Arbitration Rules. The next most frequently used type of interpretative criterion was ‘legal doctrine’, e.g., the writings of scholars and other commentaries, which were referred to in 73 decisions. See Fauchald, *supra* note 11, at 356.

⁶²³ Wälde and Weiler, *supra* note 62, at 166 (footnote omitted). See also Gaillard, ‘Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered’, in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 325 (2005), at 328 (referring to the ‘authority resulting from’ a line of FIAT awards).

⁶²⁴ Brown, *A Common Law of International Adjudication* (2007), at 226-234. But also see his discussion of limitations to courts’ abilities to develop this ‘common law’, *ibid.*, at 234-237.

rules or law, (iii) the lawyers that are involved and (iv) the functions to be carried out by those bodies.⁶²⁵ These reasons for following prior decisions apply equally to international investment law.

⁶²⁵ *Ibid.*, at 226-234. See also Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 110-112.

C. TREATIES, INSTRUMENTS OR MATERIALS

a) International Law Practice

326. International law practice shows that interpreters often seek guidance from provisions (or interpretations thereof) in other treaties similar to the provision subject to interpretation.⁶²⁶ In the *Oil Platforms* case,⁶²⁷ the ICJ was required to interpret Article XX, para. 1(d) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. That provision was identical in nature to Article XXI, para. 1(d) of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. The 1956 treaty was interpreted by the ICJ in the 1986 *Nicaragua* case.⁶²⁸ Subsequently, in the *Oil Platforms* case, when the Court was required to interpret Article XX of the 1955 Treaty, it proceeded on the basis that it saw no reason to depart from its interpretation of the identical provision in the 1956 treaty in the *Nicaragua* case.⁶²⁹

327. However, in cases where the terms of another treaty or instrument are not identical but similar, more caution appears to be exercised by the ICJ. In the *Anglo-Iranian Oil* case, the United Kingdom asserted that Iran's unilateral declaration of its acceptance of the compulsory jurisdiction of the ICJ should be interpreted on the basis that the clause at issue was copied from a unilateral declaration adopted by Belgium. This Belgian document had also been adopted by numerous other States.⁶³⁰

⁶²⁶ See, e.g., Phillimore, *Commentaries upon International Law* (1882), Vol. II, at 98, who refers to '[t]he rule of instituting a comparison between the Treaty in dispute and other treaties, whether prior, posterior, or contemporary, upon the same subject and between the same parties'; and Gardiner, *Treaty Interpretation*, at 345. See also 'Rule (F)' as formulated by the *AAP* tribunal. See text corresponding to note 636 *infra*.

⁶²⁷ ICJ Reports 161 (2003).

⁶²⁸ *Nicaragua* case, ICJ Reports 14 (1986), at 116, para. 222 and 136, para. 271.

⁶²⁹ *Oil Platforms*, ICJ Reports 161 (2003), at para. 20. A factor that should be kept in mind when this decision is contrasted with FIAT awards is that the prior interpretation was made by the same court. This is highly unlikely to happen in the case of FIATs, which comprise a different panel of arbitrators for each case (save for rare exceptions such as *Camuzzi* and *Sempra Energy* or where the case is consolidated (see, e.g., *Canfor (Consolidation Order)*).

⁶³⁰ ICJ Reports 93 (1952), at 105.

Accordingly, the United Kingdom asserted that the clause in the Iranian declaration should be understood in the same sense as the Belgian formula. The Court did not accept the United Kingdom argument because there was an interpolation of certain words in the Iranian declaration that altered the Belgian formula to such an extent that it was impossible to seek the ‘real meaning’ of the Iranian declaration in the Belgian formula.⁶³¹

328. A careful position was also adopted by the Law of the Sea Tribunal in the *MOX Plant* case:

the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires* ...⁶³²

329. Reference to other treaties or other materials may, in appropriate circumstances, be considered to fall within the scope of the Vienna Convention Rules as forming part of the Article 31(1) context or relevant international law rules under Article 31(3)(c).⁶³³

b) FIAT Practice

330. Comparative analyses of treaties are often found in FIAT awards. The Fauchald empirical analysis, for example, found 28 FIAT decisions in which BITs not the subject of the dispute were utilised in interpretative arguments and 14 others that referred to other investment related instruments.⁶³⁴ This tendency may be attributable, in large measure, to the hundreds of BIT’s covering essentially the same types of

⁶³¹ *Anglo-Iranian Oil* case, ICJ Reports 93 (1952), at 105.

⁶³² *MOX Plant* case (*Ireland v. United Kingdom*), *Provisional Measures*, Order of 3 December 2001, ITLOS Reports 95 (2001), at 106, para. 51, 41 ILM 405 (2002), 413, quoted with approval in *Access to Information under Article 9 of the OSPAR Convention* (*Ireland v. United Kingdom*), Permanent Court of Arbitration, 2 July 2003, para. 141, 42 ILM 1118 (2003), 1144. See also Professor O’Connell, who remarked that where a treaty subject to interpretation ‘forms part of a system of treaties it is permissible to interpret it in the light of the other treaties’. O’Connell, *International Law* (1970), at 260.

⁶³³ See Chapter III, Section B(4).

⁶³⁴ Fauchald, *supra* note 11, at 345.

subject matter. As a consequence, common threads are bound to weave through many of them. In this regard, McLachlan's articulation of the process by which BITs build upon antecedent BITs provides some understanding as to why prior treaty provisions are important:

Each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has entered with other states. The resulting text in each case may be different. It is, after all, the product of specific negotiation. But it will inevitably share common elements with what has gone before.⁶³⁵

331. Consequently, the examination of prior treaty provisions may be a fruitful exercise in the FIAT interpretative process. An appropriate starting point for a discussion on relevant FIAT practice is the exposition by the *AAP* tribunal concerning interpretation by reference to other treaties. That tribunal neatly summed-up the position in its self-styled Rule F:

'When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration' ... Thus, establishing the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation.⁶³⁶

332. Many FIATs have followed this approach. References have frequently been made to other treaties, either antecedent or subsequent to the treaty in dispute,⁶³⁷

⁶³⁵ McLachlan, 'The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention', 54 *ILCQ* 279 (2005), at 283-84.

⁶³⁶ *APP*, at para. 40, quoting the *Elton* case, Mexico-US General Claims Commission of 1929, Repertory, Vol. II, p. 35. The *AAP* Rule F was quoted with approval by the NAFTA tribunal in *Methanex (Final Award)*, at Part II, Chpt. B, at para. 16.

⁶³⁷ See, e.g., *Aguas del Tunari*, at paras. 292-293 ('[m]ost relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s'); *SPP (Jurisdiction)*, at paras. 102-103; *Fedax (Jurisdiction)*, at para. 34 (referring to 'most contemporary bilateral treaties' in interpreting the BIT at issue); *Gruslin*, at para. 21.4; *SGS v Philippines*, at para. 132(e); *Fedax (Jurisdiction)*, at para. 27 (referring to the Convention Establishing the Multilateral Investment Guarantee Agency 1985 interpreting the ICSID Convention); and *Enron (Jurisdiction)*, at para. 47 ('[t]here is no evidence in this case that the intention of the parties to the Argentina-United States Bilateral Treaty might be different from that expressed in other investment treaties'). See also Schreuer, *supra* note 5, at 289 (commenting that as long as they are reasonable, national legislation or treaty-based definitions should play a prominent role in the interpretation of Article 25(2)(b)).

In *SPP (Jurisdiction)*, at paras. 78-82, Egypt argued that to translate the term '*tatimmu*' to mean 'shall be' was overstating the nature of the Arabic term. In the tribunal's interpretation of that term—found in

particularly to support or confirm an interpretation.⁶³⁸ In *Pope & Talbot*, for example, the tribunal noted that

the language of Article 1105 [of NAFTA] grew out of the provisions of [antecedent] bilateral commercial treaties negotiated by the United States and other industrial countries ... there are very strong reasons for interpreting the language of Article 1105 consistently with the language in the BITs.⁶³⁹

333. But this position must be qualified. The context of each treaty's terms must also be taken into account. For example, jurisprudence as to national treatment provisions in the GATT has not been adopted by FIATs in interpreting similar provisions in investment treaties (including NAFTA Chapter 11) because of the different contexts in which GATT provisions operate.⁶⁴⁰ In this regard the *Methanex* tribunal quoted with approval the passage of the Law of the Sea Tribunal's *Mox Plant* decision set out in the International Law section above.⁶⁴¹

334. Certain FIATs have exercised a degree of caution or altogether avoided reliance on other treaties as an aid to interpretation. A few of the reasons for taking this position are as follows:

Arabic legislation that was deemed to be an acceptance of ICSID jurisdiction—it was noted that those two terms were used interchangeably in certain treaties concluded by Egypt in both the Arabic and English languages. See also its references to other treaties *ibid.*, at para. 103.

⁶³⁸ *Methanex (Partial Award)*, at para. 140 (an interpretation of NAFTA was supported by reference to the 1958 New York Convention); *Bayindir*, at para. 113 (other BITs used to confirm interpretation of BIT at issue); *Maffezini (Jurisdiction)*, at para. 68 (the relevant BIT provisions 'complement and are consistent with' the ICSID Convention); *Tokios (Jurisdiction)*, at para. 42 ('the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the [ICSID] Convention and supports our analysis under it') and para. 79 ('[t]he Tribunal's finding under the BIT is also consistent with the ICSID Convention'); Brownlie's Separate Opinion in *CME (Final Award)*, paras. 17-8 (BIT interpretation supported by reference to 1975 Final Act of the Helsinki Conference on Security and Co-operation in Europe); and *LESI*, at Pt. II, para. 25(ii) (other BITs and Energy Charter Treaty used to confirm BIT at issue).

⁶³⁹ *Pope & Talbot (Merits)*, at paras. 110-111 and 115.

⁶⁴⁰ See, e.g., *Methanex (Final Award)*, at Part II, Chpt. B, para. 16; and *Occidental (Final Award)*, at paras. 174-176. But see *Pope and Talbot (Merits)*, at paras. 45-63, 68-69.

⁶⁴¹ *Methanex (Final Award)*, at Part II, Chpt. B, para. 16. See also *Enron (Jurisdiction)*, at para. 46 ('Each instrument must be interpreted autonomously in the light of its own context').

- a) the terms of the other treaty were different;⁶⁴²
- b) no reason for a difference in language between two treaties is indicated;⁶⁴³
- c) the parties to the other treaty were different;⁶⁴⁴
- d) the tribunal was not informed by the parties of all the investment treaties signed by the contracting States to the BIT in dispute;⁶⁴⁵
- e) the other treaty related to a different discipline of international law;⁶⁴⁶
- f) the meaning of the treaty in dispute was clear;⁶⁴⁷ and
- g) the BIT practice of both parties to the BIT at issue was of ‘limited probative value’.⁶⁴⁸

335. Obviously, if the treaty provisions subject to comparison are differently worded to a significant extent, then FIATs have refused to utilise them, or interpretations thereof. The issue of differences in treaties is dealt with below.

336. Comparisons between the treaty in dispute and model BITs have also become issues in FIAT interpretation practice. A question raised in *Siemens* was whether special significance should be attached to a dispute settlement clause in the Argentina-Germany BIT because it departed from Germany’s standard BIT dispute settlement clause. The tribunal took the view that ‘it is not in its power to second-guess their intentions by attributing special meaning to phrases based on whether they were or

⁶⁴² *Aguas del Tunari*, at paras. 310-314; *Salini v Jordan (Jurisdiction)*, at paras. 116-118; and *CSOB (Jurisdiction)*, at para. 57. See also *Loewen (Award)*, at para. 235 (the only relevance of the ICSID Convention to that proceeding was that the parties had elected to function under its structure and that election could not be used to change or supplement the substance of the NAFTA Treaty’).

⁶⁴³ *Aguas del Tunari*, at paras. 299.

⁶⁴⁴ *Sempra Energy (Jurisdiction)*, at para. 144. Contrast *Plama (Jurisdiction)*, at para. 195 (‘treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty’s text at the time it was entered into’) and para. 155.

⁶⁴⁵ *Tza Yap Shum*, at para. 109.

⁶⁴⁶ *Methanex (Final Award)*, at Part IV, Chpt. B, paras. 29-30.

⁶⁴⁷ *Gruslin*, at para. 21.6.

⁶⁴⁸ *Aguas del Tunari*, at paras. 309-314. Contrast *Maffezini (Jurisdiction)*, at paras. 58-60.

were not part of a model draft.’⁶⁴⁹ As Professor Schreuer points out, model treaties are the starting point for negotiations. The extent to which the concluded treaty will echo a certain model treaty will depend on many factors, including the negotiating power of the parties, whether the both countries have their own distinct model treaties they wish to promote and the circumstances surrounding the negotiations.⁶⁵⁰

337. As a part of its interpretative process, FIATs have also referred to a diverse range of materials or information external to the treaty, including:

- a) the general practice of the signatories to the BIT at issue in respect of other investment treaties;⁶⁵¹
- b) the work of the International Law Commission;⁶⁵²
- c) the work of the Institute of International Law;⁶⁵³
- d) the work of the International Law Association;⁶⁵⁴
- e) the Harvard *Draft Convention on the International Responsibility of States for Injuries to Aliens*;⁶⁵⁵

⁶⁴⁹ *Siemens (Jurisdiction)*, at para. 106. See also *Aguas del Tunari*, at para. 298 (recognizing ‘the need for care’ in assessing differences between a treaty and a model BIT) and paras. 310-311; *Enron (Jurisdiction)*, at para. 46; *Pan American (Preliminary Objections)*, at para. 108; *El Paso*, at para. 80; *CMS (Award)*, at para. 368; and *Plama (Jurisdiction)*, at para. 204. See also *Pope & Talbot (Award)*, at paras. 110-111.

⁶⁵⁰ Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’, 3(2) *Transnational Dispute Management* (2006), at 8-9.

⁶⁵¹ See, e.g., *Maffezini (Jurisdiction)*, at paras. 58-60; *Lanco*, at para. 32; *Aguas del Tunari*, at paras. 310-314; *Sempra Energy (Jurisdiction)*, at paras. 144-145; and *Camuzzi (Jurisdiction)*, at para. 134. This type of practice may also relate to Article 31(3). The *Aguas del Tunari* award, at para. 293, considered ‘[m]ost relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s’.

In *SPP (Jurisdiction)*, at para. 110, the tribunal made reference to a non-disputing State’s (Senegal) treaty practice.

⁶⁵² See, e.g., *Eureko*, at paras. 187-8 (referring to the ILC’s work on State Responsibility); *Loewen (Jurisdiction)*, at para. 47 (referring to the ILC’s work on State Responsibility); and *Methanex (Partial Award)*, at para. 99 (referring to the ILC work on the Law of Treaties). The pronouncements of the ILC may also be indicative of international law rules dealt with in Vienna Convention Article 31(3)(c).

⁶⁵³ *American Manufacturing*, Arbitrator Golsong’s Separate Opinion, at para. 13.

⁶⁵⁴ *World Duty Free Company*, at para. 139.

- f) the Statute of the ICJ;⁶⁵⁶
- g) United Nations General Assembly Resolutions;⁶⁵⁷
- h) United Nations Conference on Trade and Development reports;⁶⁵⁸
- i) Organization for Economic Cooperation and Development reports;⁶⁵⁹
- j) the American Law Institute's 1987 *Restatement of the Law Third, the Foreign Relations of the United States*;⁶⁶⁰
- k) the submissions of a respondent State in another case relating to the same treaty provision;⁶⁶¹
- l) official statements and other materials of governments of States party to the treaty in question;⁶⁶² and

⁶⁵⁵ See, e.g., *Tokios (Jurisdiction)*, at para. 92. This draft convention is published in Sohn and Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 *AJIL* 545 (1961).

⁶⁵⁶ See, e.g., *Casado (Provisional Measures)*, at para. 1 (noting that because Article 47 of the ICSID Convention was 'directly inspired' by Article 41 of the ICJ Statute, 'particular importance' could be accorded to the judgments of the ICJ and PCIJ); and *Goetz (Award)*, at para. 54 (noting that because Article 45(1) of the ICSID Convention, and Article 42 of the ICSID Arbitration Rules were inspired by Article 53 of the ICJ Statute, it was 'appropriate to refer to the principles enunciated by the International Court of Justice').

⁶⁵⁷ *SPP (Opinion)*, at 254-5.

⁶⁵⁸ *Lauder*, at para. 292; and *Gruslin*, at para. 21.3.

⁶⁵⁹ *Saluka (Award)*, at para. 284, n. 18; *Pope & Talbot (Merits, Phase 2)*, at para. 78, n. 73. In that same case, reference was made to the 1968 OECD Draft Convention on the Protection of Foreign Property but this was distinguished and not relied on by the tribunal. *Pope & Talbot (Merits)*, at para. 112.

⁶⁶⁰ *Feldman (Award)*, at para. 99, 105-7.

⁶⁶¹ See, e.g., *Bayindir*, at para. 129. This type of situation may extend beyond the contours of treaty interpretation and may be seen equally as an instance of the preclusive effects of a prior statement (see, e.g., *Phillips Petroleum Company Iran v Iran*, 21 Iran-US CTR 79 (1989), at para. 207) or a rule of evidence that contradictory statements or conduct of an interested party should be construed against that party (see e.g., *Woodward-Clyde Consultants v Iran*, 3 Iran-US CTR 239 (1983), at pp. 246-47; and J.R. Weeramantry, 'Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: The Practice of the Iran-United States Claims Tribunal', 27 *Netherlands Yearbook of International Law* 265 (1996)). See also, *Sempra Energy (Jurisdiction)*, at paras. 132 and 143-145; *Methanex (Partial Award)*, at para. 145; and *Enron (Jurisdiction)*, at para. 47.

⁶⁶² *Aguas del Tunari*, at paras. 271 and 294; *Mondev*, at paras. 111-112; and *Ethyl (Jurisdiction)*, at para. 84, n. 32. In *Gruslin*, materials submitted by Malaysia to support its interpretation included a memorandum from the Malaysian Ministry of Trade and Industry to the Malaysian Attorney-General's Chambers and records of interview of Malaysian officials involved in the negotiations of the investment treaty at issue. The tribunal expressed a reluctance to allow extrinsic materials to colour the meaning of

m) the World Bank Guidelines on the Treatment of Foreign Direct Investment.⁶⁶³

338. In relation to the use of government materials produced during ratification or implementation of a treaty, the *Mondev* tribunal stated that

Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*.⁶⁶⁴

339. The *Mondev* tribunal referred specifically to the US government transmittal statement for the 1995 US-Albania BIT to its legislature. That treaty contained language similar to the NAFTA provision at issue in *Mondev*, and was considered to have shed light on that NAFTA provision.⁶⁶⁵

340. However, care needs to be exercised when using extrinsic treaties and materials as a guide to interpretation. In particular regard to other treaties, their texts may fail to reveal important nuances of the wording as understood by the signatories to the treaty at issue.⁶⁶⁶ In this regard, the caution expressed in *Aguas del Tunari* is apposite:

The practice of a state as regards the conclusion of BITs other than the particular BIT involved in a dispute is not of direct value to the task of interpretation under Article 31 of the Vienna Convention. The fact that a pattern might exist in the content of the BITs entered into by a particular state does not mean that a specific BIT by that state should be

particular terms of the investment treaty. The tribunal observed that if the meaning of the phrase ‘is found to be clear, the Tribunal will not reduce its reach by reference to general considerations or assumptions derived from extrinsic sources of the sort relied upon by the Respondent in its materials and arguments’. *Gruslin*, at paras. 17.1 and 21.4-21.6. In relation to government investment promotion materials, see *SPP (Jurisdiction)*, at paras. 112 and 115 (noting in relation to the interpretation of a domestic statute providing Egypt’s consent to ICSID arbitration that ‘[i]nvestment promotion literature does not create rights; it informs potential investors of the rights they will enjoy by virtue of existing law if an investment is made’ and that ‘[w]hile there is no question of investment promotion literature altering the terms of a statute, in the present case the materials published by the General Authority merely confirm the conclusion already reached by the Tribunal’).

⁶⁶³ *Fedax (Jurisdiction)*, at para. 35.

⁶⁶⁴ *Mondev*, at para. 111.

⁶⁶⁵ *Mondev*, at para. 112. See also *CMS (Award)*, at para. 362.

⁶⁶⁶ As Thomas Wälde and Todd Weiler have observed, dangers lurk in the practice of comparing seemingly similar treaties, especially the risk of overlooking the particularities of text, context and purpose. Wälde and Weiler, *supra* note 62, at 166, n. 19.

understood as necessarily conforming to that pattern rather than constituting an exception to that pattern.⁶⁶⁷

341. In *TSA Spectrum de Argentina SA v Argentina*, the tribunal refused to interpret a treaty provision with reference to how it is understood under national law. It held that because the term “final decision” in Article 10(3) of the 1994 Argentina-Netherlands BIT

appears in an international treaty and not in a purely national context, it is appropriate to give it an autonomous meaning and thus interpret it independently of any meaning the same term may have in the national laws of the two Contracting States.⁶⁶⁸

342. In connection with ICSID arbitrations, the Report of the Executive Directors⁶⁶⁹ merits separate discussion. Essentially, the Report is a type of explanatory note or set of guidelines for the ICSID Convention. Numerous references to the Report have been made by ICSID tribunals in their interpretation of the ICSID Convention.⁶⁷⁰ It does not appear to be considered as part of the preparatory work of the ICSID Convention.⁶⁷¹ Reference to the Report is sometimes made even before any other Article 31 analysis takes place.⁶⁷² Although no FIAT has stated as such, its proper place in the framework of the Vienna Convention Rules is likely to be as part of the context, in the sense that it is an instrument connected with the conclusion of the treaty as provided for in Article 31(2)(a). Characterised in this way, an interpreter’s

⁶⁶⁷ *Aguas del Tunari*, at para. 291.

⁶⁶⁸ *TSA Spectrum (Award)*, at para. 101.

⁶⁶⁹ Approved on 18 March 1965 by the Directors at the same time they approved the final text of the Convention. See *History of the ICSID Convention*, Vol. II, Part 2, p.1039. The Report was transmitted to governments at the same time the text of the Convention was submitted for signature and ratification, acceptance or approval. *History of the ICSID Convention*, Vol. II, Part 2, p.1086.

⁶⁷⁰ See, e.g., *Kaiser Bauxite*, at para. 17; *Bayindir*, at para. 125; *LESI*, at Pt. 2, para. 13; *CSOB (Jurisdiction)*, at para. 63; *Wena Hotels (Jurisdiction)*, at 85; *Lanco*, at paras. 42-43; *Tokios (Jurisdiction)*, at para. 99; and *Azurix (Jurisdiction)*, at para. 58. See also Fauchald, *supra* note 11, at 330.

⁶⁷¹ See, e.g., *Banro*, at para. 20, which suggests that the preparatory work is distinct from the Report of the Executive Directors. The tribunal there first referred to the preparatory work in making its point and then said this was ‘also confirmed’ by the Report.

⁶⁷² See, e.g., *Goetz (Award)*, at para. 83, in which the tribunal immediately referred to the Report’s definition of ‘legal dispute’ in Article 25 of the ICSID Convention, prior to any other Article 31 analysis. Similarly, see *Fedax (Jurisdiction)*, at 189, para. 15 and *Joy Mining*, at para. 42.

immediate recourse to the Report would be fully consistent with the Article 31 process.

343. Another issue requiring discussion in this Section is the relationship between the ICSID Arbitration Rules and the ICSID Convention. Those Arbitration Rules add detail to the procedural provisions already contained in the ICSID Convention.⁶⁷³ Although no FIAT has used the ICSID Arbitration Rules to determine an interpretation of the ICSID Convention,⁶⁷⁴ FIATs have used those Rules to confirm or support the interpretation of that Convention.⁶⁷⁵ Recourse to the ICSID Arbitration Rules to interpret the ICSID Convention may be found under Vienna Convention Article 31(3). Under this provision, the Arbitration Rules may constitute a subsequent agreement between the parties regarding the application of the ICSID Convention or a subsequent practice in the application of the treaty establishing the agreement of the parties as to its interpretation.⁶⁷⁶ The *ADF* tribunal's interpretation of the ICSID Arbitration (Additional Facility) Rules is of interest in this respect. In that case, the tribunal referred to the ICSID Convention and the ICSID Arbitration Rules and stated that 'while these two instruments are not applicable to Additional Facility cases, like

⁶⁷³ See, e.g., Articles 36-63 of the ICSID Convention. In this regard Article 44 provides '[a]ny arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration').

⁶⁷⁴ Indeed, interpreters must be mindful that the ICSID Arbitration Rules are subordinate to the ICSID Convention and in the unlikely event of a conflict between the two instruments, the Convention should prevail. See, e.g., *CAA-Vivendi (Challenge)*, at para. 10 and Schreuer, *supra* note 5, at 677.

⁶⁷⁵ See, e.g., *Amco (Annulment)*, at para. 37; *Amco (Resubmitted Case)*, 1 ICSID Reports 543, at 567; and *MINE (Annulment)*, at para. 4.07. *Fedax (Jurisdiction)*, at para. 28 referred to the ICSID Rules Governing the Additional Facility in interpreting the ICSID Convention. See also *Aguas Provinciales*, at para. 14 (referring to the UNCITRAL Arbitration Rules in interpreting the ICSID Convention); *Vacuum Salt*, at 337, para. 29, n. 9; and *Guinea v Atlantic Triton Company Limited*, 26 October 1984, Cour d'appel, Rennes (Second Chamber), 3 ICSID Reports 3, at 8 (this judgment was overturned by the Cour de Cassation).

⁶⁷⁶ A reason why the Arbitration Rules may be considered to be an agreement of the parties is that they are adopted by ICSID's Administrative Council, which is composed of one representative of each signatory to the ICSID Convention. See Articles 4(1) and 6(1)(c) of the ICSID Convention.

the instant case, they often do supply, in our opinion, relevant, and even close, analogues for terms used in the Additional Facility Rules'.⁶⁷⁷

344. A further issue relevant to this Section is whether the ICSID Arbitration Rules may supplement the ICSID Convention when there is a gap in the latter. This was a very real problem for the *ad hoc* Committee in the *CAA-Vivendi (Challenge)* case, which was required to determine a challenge made by a party against the Committee's president. The *ad hoc* Committee found that the ICSID Convention contained no provision governing the challenge of a member of an *ad hoc* Committee. In contrast, this issue was addressed in ICSID Arbitration Rules 9 and 53. Before the *ad hoc* Committee could utilize the Arbitration Rules to fill the gap in the ICSID Convention, it was considered necessary to determine whether the drafters of the ICSID Convention deliberately omitted such a provision from the Convention, in which case, the Committee doubted whether ICSID's Administrative Council, the drafters of the Arbitration Rules, had competence to achieve by those Rules what the Convention itself intentionally did not achieve.⁶⁷⁸

345. As part of its decision, the *ad hoc* Committee examined the history of the ICSID Rules, which, in their opinion, showed that the intention of the Administrative Council was to apply all the Arbitration Rules, so far as was possible, to annulment proceedings. It added

[i]n our view the only reason why the procedure laid down in Arbitration Rule 9 could not be applied to members of *ad hoc* Committees *mutatis mutandis* would be if to apply such a procedure was inconsistent with the Convention, having regard to its object and purpose. We see no reason to regard it as such.

...

... the *travaux préparatoires* of the Convention do not suggest that there was any particular reason for excluding the application of [the Convention's provisions concerning the replacement and disqualification of arbitrators in annulment proceedings]. It appears that no State party at the time of the adoption of Arbitration Rule 53 suggested any such reason. That Rule was adopted unanimously and was treated by the Members

⁶⁷⁷ *ADF (Award)*, at para. 144. See also *Methanex (Partial Award)*, at paras. 125-6 (referring to the ICJ Rules of Procedure in its interpretation of the UNCITRAL Arbitration Rules).

⁶⁷⁸ *CAA-Vivendi (Challenge)*, at para. 5. See also Schreuer, *supra* note 5, at 1042.

of the Administrative Council as uncontroversial. In the circumstances, the unanimous adoption of Arbitration Rule 53 can be seen, if not as an actual agreement by the States parties to the Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation.⁶⁷⁹

346. In a footnote to this passage, the Committee made express reference to Article 31(3) of the Vienna Convention. The approach of the Committee (effectively to supplement the ICSID Convention using the ICSID Arbitration Rules) may be considered to be in conformity with international law.

D. SCHOLARLY OPINION

a) *International Law Practice*

347. Scholarly opinions or ‘teachings of the most highly qualified publicists of the various nations’, as noted in Article 38(1)(d) of the Statute of the ICJ, are not a ‘source’ of international law. They, like judicial decisions, constitute a ‘*subsidiary* means for the determination of rules of law’.⁶⁸⁰ The case law of the ICJ reveals that the Court is reticent in citing authors of scholarly literature by name.⁶⁸¹ Nonetheless, it has been commented that ‘the scarcely avowed use of the ‘teachings of publicists’ in the Court’s case law probably does not accurately reflect the influence these ‘teachings’ still have’.⁶⁸²

348. The ICJ’s reticence in indicating specific opinions of writers may be ascribed to (1) the diplomatic sensitivities that surround much of the ICJ’s work, (2) the ‘small

⁶⁷⁹ *CAA-Vivendi (Challenge)*, at paras. 10-12 (footnotes omitted).

⁶⁸⁰ Article 38 of the ICJ Statute (emphasis added).

⁶⁸¹ Pellet, ‘Article 38’, in Zimmermann, et al., (eds.), *The Statute of the International Court of Justice: A Commentary* 677 (2006), at 791; and Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume III, Procedure* (Leiden: Martinus Nijhoff 2006), at 1558-9. This is not the case in respect of individual opinions of ICJ Judges. See Pellet, at 791-2.

⁶⁸² Pellet, *ibid.*

world’ of international law in which the Court is ‘well-advised not to distribute good or bad marks’ and (3) the ‘abstract discussions’ found in scholarly works.⁶⁸³

b) FIAT Practice

349. FIAT practice is markedly different from the practice of the ICJ. It is commonplace for tribunals to indicate that their views are ‘shared’ or ‘confirmed’ by specific scholarly literature on the subject under determination.⁶⁸⁴ In Fauchald’s empirical analysis, ‘legal doctrine’ (largely including scholarly literature) was the second most frequently utilised criterion by ICSID tribunals in their interpretative arguments.⁶⁸⁵

350. An illustration of the use of scholarly literature is found in *Wena Hotels*, in which the tribunal, after citing several relevant academic works, concluded that

[i]n the absence of any direct evidence of the intent of the Arab Republic of Egypt and the United Kingdom in negotiating Article 8(1), the Tribunal was strongly convinced by this common academic interpretation.⁶⁸⁶

351. Professor Schreuer has written one of the seminal works on the ICSID Convention. Entitled *The ICSID Convention: A Commentary*, the work provides an extremely fastidious and systematic study of every provision in the ICSID Convention. The work has been of immeasurable value to academics, practitioners and arbitrators in the field of international investment law. Despite the vast body of jurisprudence that amassed since its publication, and despite its age, it still continues to be one of the leading authorities in the field. A vast number of ICSID awards refer

⁶⁸³ Pellet, *ibid.*, at 792.

⁶⁸⁴ See generally, Schreuer, *supra* note 5, at 617.

⁶⁸⁵ Fauchald, *supra* note 11, at 356.

⁶⁸⁶ *Wena Hotels (Jurisdiction)*, at 82. See also *Aguas del Tunari*, at para. 283 (taking the view that among other things ‘scholarly commentary’ indicated that the drafters of the ICSID Convention intended a flexible definition of ‘control’ in Article 25); *Amco (Annulment)*, at para. 22 and at para. 34; and *Pope & Talbot (Merits)*, at para. 113.

to Schreuer's Commentary.⁶⁸⁷ During the very late stages of completing this thesis, a second edition of this work was published. It remains to be seen how this new edition will be treated by FIATs.

352. In addition to Schreuer's commentary, there are a number of other notable persons whose works are frequently cited in FIAT awards. Aron Broche's work on initiating, drafting and finalising the ICSID Convention has led to a high degree of authority being accorded to his writings on the preparatory work of the Convention.⁶⁸⁸ In fact, in his capacity of General Counsel of the World Bank, Broches signed the ICSID Convention.⁶⁸⁹ He was the chair of (1) the regional consultative meetings of legal experts that deliberated on the preliminary draft of the Convention and (2) the Legal Committee on Settlement of Investment Disputes that produced a revised draft that formed the basis of the ICSID Convention's final text.

⁶⁸⁷ See, e.g., *Goetz (Award)*, at para. 67, n. 14, *Tokios (Jurisdiction)*, at paras. 22, 26, 42, 88, 94, 98, 106; *Impregilo*, at paras. 108, n. 57 and 133; *Joy Mining*, para. 53, n. 18; *Aguas del Tunari*, at para. 281; *Fedax (Jurisdiction)*, at para. 21; *Tokios (Opinion)*, at para. 19; *Wena Hotels (Jurisdiction)*, at 82-3; *Bayindir*, at 127; *Methanex (Partial Award)*, at para. 107, n. 8; *Maffezini (Jurisdiction)*, at para. 31, n. 6, para. 74, n. 54, at para. 94, n. 69; *Mitchell (Jurisdiction)*, at para. 41, n. 14; *CSOB (Jurisdiction)*, at para. 38, n. 7; *Duke v Peru*, at para. 130; *LGE (Award)*, at para. 85, n. 3; *Vivendi (Annulment)*, at paras. 62, 64, 66 and 86; *CAA (Challenge)*, at para. 12; *LESI (Award)*, at para. 8(i); *Aucoven (Jurisdiction)*, at para. 51; *Aucoven (Award)*, at para. 91; *Banro*, at para. 19; *ADF (Award)*, at para. 144, n. 151; *AES*, at para. 40, n. 18; *Camuzzi (Jurisdiction)*, at para. 20, n. 7; *MTD (Stay of Execution)*, at para. 27, n. 1; *Salini v Jordan (Award)*, at para. 102; *Sempra Energy (Jurisdiction)*, at para. 30, n. 7; *SGS v Pakistan*, at para 48, n. 48; *SGS v Philippines*, at para. 29, n. 5; *Siemens (Jurisdiction)*, at para. 169, n. 157; and *Wena (Interpretation Decision)*, at para. 81, n. 60. Some of these references are to Professor Schreuer's contributions to Volumes 11 to 15 of the *ICSID Review-Foreign Investment Law Journal* (1996 to 2000). Altogether, these volumes contained eight articles by Professor Schreuer, which collectively represent a significant part of Schreuer's Commentary. See Schreuer, *supra* note 5, Preface, at xviii.

⁶⁸⁸ In *Vacuum Salt*, at para. 37, he was described as 'the acknowledged authority' on the ICSID Convention. See, also *Fedax (Jurisdiction)*, at para. 21; *Aucoven (Jurisdiction)*, at paras. 96-8; *CSOB (Jurisdiction)*, at para. 17; *Aguas del Tunari*, at para. 284; *Tokios (Jurisdiction)*, paras. 25, 46 and 69; *Wena Hotels*, *Jurisdiction*, at 82 and 83; and *Klöckner (Award)*, at 15. His most cited work is Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 *Recueil des Cours* 331 (1972-II).

⁶⁸⁹ See Schreuer, *supra* note 5, at 1290. See also *History of the ICSID Convention*, Vol. 2, Part II, p. 1040.

353. Other distinguished commentators that find prominence in FIAT awards include Dolzer and Stevens;⁶⁹⁰ C.F. Amerasinghe;⁶⁹¹ and Georges Delaume.⁶⁹²

354. The *Mihaly* tribunal, in conformity with the Statute of the ICJ, acknowledged that scholarly opinion was a subsidiary means of determining rules of law.⁶⁹³ The tribunal's award also qualified the reference to teachings of the most highly qualified publicists in Article 38 of the ICJ Statute. It stated without further elaboration that '[o]pinions of experts on the theory and practice of multinational corporations' were not to be equated with the ICJ Statute Article 38 reference to teachings of publicists.⁶⁹⁴ The statement indicates, correctly, that expert opinions prepared especially for a specific dispute cannot be regarded as Article 38(1)(d) teachings. There may thus be a considerable variance in the deference paid to the publications of highly regarded international scholars and commentators as opposed to their expert opinions prepared (on instruction by a party) for a particular case.⁶⁹⁵

⁶⁹⁰ *Eureko*, at para. 251 describes their work *Bilateral Investment Treaties* as '[t]he leading work on bilateral investment treaties'. See also *Wena Hotels (Jurisdiction)*, at 83-4, *Olguín (Jurisdiction)*, at para 26; *Genin*, at paras. 367, 368, *Lauder*, paras. 200 and 308; *Pope & Talbot (Merits, Phase 2)*, at para. 111, n. 105; and *Mondev*, at para. 79, n. 19.

⁶⁹¹ He is often cited in relation to his studies on ICSID's jurisdiction: 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166, 214 (1979); and 'Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', (1974-1975) *BYBIL* 227. See, e.g., *Tokios (Jurisdiction)*, para 68 (referring to what it termed 'Dr. Amerasinghe's corollary rule of interpretation') and 97; *Wena Hotels, Jurisdiction*, at 82; *Aucoven (Jurisdiction)*, at para. 62; *Fedax (Jurisdiction)*, at para. 22; and *Vacuum Salt*, at paras. 29, n. 9, para. 37 and para. 42.

⁶⁹² See, e.g., his publications 'ICSID Arbitration: Practical Considerations', 1 *Journal of International Arbitration* 101 (1984); and 'ICSID Arbitration and the Courts', 77 *AJIL* 784 (1983). See *Wena Hotels (Jurisdiction)*, at 82; *Salini v Morocco (Jurisdiction)*, at para. 27; *Fedax (Jurisdiction)*, at paras. 22-3; *Tokios (Jurisdiction)*, at para. 42, n. 27; and *Vacuum Salt*, at para. 29, n. 9.

⁶⁹³ See, e.g., *Mihaly*, at para. 58. Note, however, that this case indicated that 'experts on the theory and practice of multinational corporations' fell outside the ambit of 'teachings of the most highly qualified publicists'. *Ibid.*

⁶⁹⁴ *Mihaly*, at para. 58.

⁶⁹⁵ See, e.g., the *CME* tribunal's evaluation of the expert opinion provided by Professor Schreuer, one of the leading academics in the field of ICSID arbitration. *CME (Final Award)*, at paras. 401-413 (e.g., 'Prof. Schreuer's conclusions are not adequately supported by his citations, when closely read. Prof. Schreuer's conclusions are carefully drafted with reference to assumptions which are not in accord with the facts of this case.'). As to the opinions of authoritative public international lawyers on points of substantive law prepared specifically for one side in a case, see *Loewen (Award)*, at para. 150.

355. Part of the reason for the difference in ICJ and FIAT practice could lie in the commercial nature of investor-State arbitration and also the autonomy and different composition of each tribunal. It must be said that the FIAT practice is preferable to that of the ICJ because the former embodies a more transparent process, gives recognition to deserving academic literature and generally enhances the legitimacy of the adjudicative process.

356. Another reason for the frequency of FIAT recourse to academic literature may also lie in the history of foreign investment arbitration. In its early days, relatively few FIAT awards existed. Given this barren environment of judicial practice, FIATs turned to the relatively verdant source of scholarly opinion for jurisprudential sustenance. The recent growth of case law generated by FIATs has no doubt changed this dynamic: the accumulation of publicly available case law increases the ability of arbitrators to use cases in support of their decisions. This, in turn, means there is less need to rely on academic literature. The awards reviewed for this thesis have evidenced that over time a distinct shift has taken place: FIATs have started to refer to past awards more than scholarly literature. Arguably, prior decisions have more practical value than scholarly opinion because they represent ‘real-life’ applications.⁶⁹⁶

E. INTER-TEMPORAL ASPECTS

a) International Law Practice

357. An examination of the drafting history of the Vienna Convention Rules reveals that Waldock’s Third Report (1964) and the ILC Draft Articles 1964 included a rule requiring an interpretation to be made in the light of ‘international law in force at the time of the *conclusion* of the treaty’.⁶⁹⁷ A contrary proposal was made at the Vienna

⁶⁹⁶ See, e.g., Pellet, *supra* note 681, at 791.

⁶⁹⁷ Draft Article 70(1)(b) of Waldock III (emphasis added). See Annex II. See also draft Article 56 of Waldock III and draft Article 69(1)(b) of the ILC Draft Articles 1964. Fitzmaurice was a staunch supporter of this approach. See, e.g., Fitzmaurice (1957), *supra* note 185, at 212 and 226 (‘to interpret

Conference by Czechoslovakia's delegation, which submitted that the interpretation should be made on the basis of the rules in force at the time of the *application* of the treaty.⁶⁹⁸ Neither of these approaches were finally adopted and no reference to time was included in the final text of the rule requiring consideration of relevant rules of international law (Article 31(3)(c)). Eduardo Jiménez de Aréchaga explains the omission of any reference to a relevant time was that it

is a question which must remain open and depends on whether the parties intended to incorporate in the treaty some legal concepts with a meaning that would remain unchanged, or intended to leave certain terms as elastic and open ended, subject to change and susceptible of receiving the meaning they might acquire in the subsequent development of the law.⁶⁹⁹

358. The ILC's position reflects Judge Huber's famous dictum in the *Island of Palmas* case in which he observed that 'a juridical fact must be appreciated in the light of the law contemporary with it' but also that the existence of rights 'shall follow the conditions required by the evolution of the law.'⁷⁰⁰

359. A decision in which the subsequent development of the law was clearly recognised was rendered by the WTO Appellate Body in the *Shrimp Products* case. The Appellate Body there stated that '[f]rom the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary."⁷⁰¹

such treaties according to modern concepts, would often amount to importing into them provisions they never really contained, and imposing on the parties obligations they never actually assumed').

⁶⁹⁸ Vienna Conference, First Session, Committee of the Whole, 33rd meeting, para. 54.

⁶⁹⁹ Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 *Recueil des cours* 1 (1978), at 49.

⁷⁰⁰ (US v. Neth.) 2 *RIAA* 829 (1949), at 845.

⁷⁰¹ *Shrimp Products* case (1998), at para. 130. See also Dissenting Opinion of Judge Alvarez in the *Competence of the General Assembly regarding Admission to the United Nations*, ICJ Reports 4 (1950), at 18 ('a treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it'); Judge Azevedo's Dissenting Opinion in *Competence of the General Assembly regarding Admission to the United Nations*, ICJ Reports 4 (1950), at 23 ('[t]o comply with [the UN Charter's] aims one must seek the method of interpretation most likely to serve the natural evolution of the needs of mankind'); and Hudson, *The Permanent Court of International Justice, 1920-1942* (1943),

b) FIAT Practice

360. In the *Mondev* case, the interpretation of NAFTA Article 1105 required the tribunal to decide whether the NAFTA States were correct in suggesting that this provision's content (particularly its reference to fair and equitable treatment and full protection and security) was correctly expressed by the Mexico-United States General Claims Commission in the *Neer* case.⁷⁰² The standard adopted in *Neer* was high:

the treatment of an alien ... should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.⁷⁰³

361. One of the grounds upon which the *Mondev* tribunal declined to apply the *Neer* standard was that it was determined in the 1920s and did not take into account the intervening developments in the law:

Neer and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.⁷⁰⁴

362. The tribunal then referred to the sizeable number of modern investment treaties that, in its view, almost uniformly provided for a standard of protection that was higher than the standard established in *Neer*. In the light of this recent development, the *Mondev* tribunal concluded '[i]t would be surprising if this practice

at 658 ('[w]ith the lapse of time, intentions entertained by the draftsmen of an instrument may lose some of their importance, and a course of action by those who must live with and under the provisions of the instrument may assume a correspondingly greater significance').

⁷⁰² *United States (LF and PE Neer) v Mexico*, United States-Mexico General Claims Commission, 15 October 1926, 21 *AJIL* 555 (1927) (Supplement).

⁷⁰³ *Mondev*, at para. 114.

⁷⁰⁴ *Mondev*, at para. 116.

and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927'.⁷⁰⁵

363. Additionally, the tribunal commented on the need to consider evolutionary processes in the development of an international law concept over a long period of time:

A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux*, with normal principles of interpretation and with the fact that, as the Respondent accepted in argument, the terms “fair and equitable treatment” and “full protection and security” had their origin in bilateral treaties in the post-war period. In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.

...

... there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. ...⁷⁰⁶

364. Similarly, in connection with the interpretation of NAFTA Article 1105, the *Pope and Talbot* tribunal held that customary international law standards of treatment have ‘evolved since 1926, and, were the issue necessary to the Tribunal’s decision

⁷⁰⁵ *Mondev*, at para. 117. See also *Azurix (Award)*, at para. 361; *LG&E (Liability)*, at para. 125; and *CMS (Award)*, at para. 284.

⁷⁰⁶ *Mondev*, at paras. 123 and 125. Similarly, Wälde and Weiler have suggested the following:

We suggest that the right approach is not to allow oneself to become too entangled in historical controversies about the minimum standard, but rather to follow general principles of treaty interpretation in applying the relevant provisions to the facts of a given case. This approach requires interpretation of treaty terms in their prevailing literal meaning, supported by the context and purpose of the treaty. Notions of ‘fair and equitable’, ‘constant protection’ or ‘avoidance of unreasonable impairment’ cannot be understood in the sense the minimum standard was discussed in the 19th century (relying on the prevailing standards of good governance), but must rather be read with today’s prevailing standard of good governance. This means that one must take into account the decades of international treaty practice, authoritative soft-law instruments and state practice which have evolved since at least the Second World War as indicative of such standards.

Wälde and Weiler, *supra* note 62, at 187.

here, it would propose a formulation more in keeping with the present practice of states'.⁷⁰⁷ However, the tribunal did not apply its interpretation because it considered that even under the minimum standard of customary international law proposed by Canada (i.e., according to the standard pronounced in the *Neer* case), damages would be owing to the claimant.

365. The effect of over 2500 BITs on the development of customary international law cannot be underestimated. Nonetheless, it is still prudent to strike a balance between subsequent developments and the concerns of textualists, such as Judge Fitzmaurice, ever vigilant against importing terms into treaties and imposing obligations on parties that are not strictly evident on the face of the text.⁷⁰⁸

366. Evolutionary considerations are found also in the *Tradex* case. Although the issue there concerned the interpretation of a domestic Albanian law that provided foreign investors recourse to ICSID arbitration, the approach adopted is similar to the evolutionary treaty interpretation positions taken in *Mondev* and *Pope and Talbot*. The tribunal in *Tradex* said this:

The interpretation of Art. 8 and Art. 9 of the 1993 Albanian Law adopted by the tribunal appears confirmed by the developments in the Albanian investment laws of 1990, 1992 and 1993. Clearly, there has been a continuous evolution of such investment laws to assure a constantly better protection of the investments; this explains why an investment made in 1990 does not remain submitted to the rules in force at the moment in which it was made, but is subsequently submitted to the new rules. ... The succession in time of dispute settlement mechanisms is to be evaluated in such a context of progressive evolution.⁷⁰⁹

367. Of the standard of compensation to be paid by host States to investors, the CME tribunal said this:

⁷⁰⁷ *Pope and Talbot (Damages)*, at para. 65. But see *Glamis Gold*, at para. 616.

⁷⁰⁸ See, e.g., Fitzmaurice (1957), *supra* note 185, at 226.

⁷⁰⁹ *Tradex (Jurisdiction)*, at 67. See also *Eureko*, at para. 258 (noting the doctrine that presumes sovereign rights override the rights of a foreign investor 'has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties').

The possibility of payment of compensation determined by the law of the host State or by the circumstances of the host State has disappeared from contemporary international law as it is expressed in investment treaties in such extraordinary numbers, and with such concordant provisions, as to have reshaped the body of customary international law itself.⁷¹⁰

368. In contrast to the above FIAT cases, the *LG&E* tribunal considered a more rigid position was required when determining whether the essential security measures under the US-Argentina BIT were self-judging. The tribunal took the view that

The provisions included in the international treaty are to be interpreted in conformity with the interpretation given and agreed upon by both parties at the time of its signature, unless both parties agreed to its modification.⁷¹¹

369. The tribunal concluded that only after the US-Argentina BIT was signed did the United States begin to consider its essential security measures treaty provisions as self-judging. On this basis, Argentina's contention that the security measures provisions were self-judging was rejected.

370. The cases discussed in this Section indicate the wisdom of the drafters of the Vienna Convention Rules in deciding not to specify that an interpretation must be related to a meaning that exists at a certain period of time. As the above cases illustrate, sometimes an evolutionary interpretation is required, and FIATs tend to do this particularly in the light of the huge number of BITs that have been signed in the past two decades. At other times the tribunal may see a real need for the interpretation to be anchored to the meaning held at the time of the signature or conclusion of the treaty.

⁷¹⁰ *CME (Final Award)*, at para. 498.

⁷¹¹ *LG&E (Merits)*, at para 213.

F. PRINCIPLE OF EFFECTIVENESS

a) International Law Practice

371. The interpretative principle of effectiveness does not find express reference in the Vienna Convention Rules. It operates on the presumption that parties intended that all the terms in their agreement had a purpose and that they did not intend any part of it to be ineffective.⁷¹² The principle found a place in Waldock's Third ILC Report but was removed in subsequent ILC drafts.⁷¹³ Ultimately, the ILC considered the principle to be embodied in Article 31(1), particularly within the parameters of the good faith and object and purpose criteria.⁷¹⁴

372. The PCIJ and the ICJ have invoked the principle many times.⁷¹⁵ In *Libya v. Chad*, the ICJ referred to it as 'one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence.'⁷¹⁶ The WTO Appellate Body placed the principle within the scope of the Vienna Convention Rules when it observed that '[a] fundamental tenet of treaty interpretation flowing from the general

⁷¹² See, e.g., Pollux, 'The Interpretation of the Charter', 23 *British Yearbook of International Law* 54 (1946), at 68-9 ('the aim of interpretation is to give effect to the instrument; to give it an interpretation which, on the whole, will render it most effective and useful.') and at 70 ('the aim [of interpretation] must be to endow international conventions with the maximum possible effect.');

and Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), at 69-70 and the revised 1958 version of that book, at 228.

⁷¹³ See Annex II.

⁷¹⁴ YICL (1966-II), at 219, para. 6.

⁷¹⁵ For other applications or references to this principle, see *Territorial Dispute (Libya v Chad)*, ICJ Reports 6 (1994), at 23, para. 47; *Corfu Channel* case, ICJ Reports 4 (1949), at 24; *Acquisition of Polish Nationality*, Advisory Opinion (No. 7), PCIJ, Series B (1923), at 17; *Free Zones of Upper Savoy and the District of Jex*, Order of 19 August 1929, PCIJ, Ser. A, No. 22, p. 13; the Dissenting Opinion of Judge de Visscher in the *South West Africa* Advisory Opinion, ICJ Reports 128 (1950), at 187; *Border and Transborder Armed Actions*, Judgment, ICJ Reports 69 (1988), at 89, para. 46; and YILC (1966), Vol. II, at 219.

⁷¹⁶ *Territorial Dispute (Libya v Chad)*, Judgment, ICJ Reports 6 (1994), at 25, para. 51.

rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness (*ut res magis valeat quam pereat*),⁷¹⁷

373. The principle is not free from criticism or concerns that it may override the treaty text or its object and purpose. ICJ, for instance, has indicated that the principle of effectiveness will not be applied if it is contrary to the letter and spirit of the provisions subject to interpretation.⁷¹⁸ Fitzmaurice noted that the principle had teleological leanings and was concerned ‘to keep it within bounds, to prevent it from leading to judicial legislation’.⁷¹⁹ Thirlway has been critical of the principle on another ground. He has observed that if

a particular set of circumstances had arisen or could be imagined in which a treaty provision, according to an otherwise acceptable interpretation, would be ineffective or lead to improbable results, this is not necessarily a ground for rejecting that interpretation. The principle of effectiveness should be employed as an aid to assessment of likely intentions, rather than as a rigid canon of interpretation whereby the text must be deemed to be effective in all circumstances.⁷²⁰

374. Thirlway qualifies this statement by adding that an ineffective interpretation should be excluded only where there is an alternative interpretation that produces an effective result and does not offend against other canons of interpretation.⁷²¹

⁷¹⁷ *Japan – Taxes on Alcoholic Beverages II*, AB-1996-2, WTO Appellate Body, WT/DS8,10&11/AB/R (4 October 1996), at 12. See also Gardiner, *Treaty Interpretation* (2008), at 159-161.

⁷¹⁸ See the *Interpretation of Peace Treaties (Second Phase)* case, ICJ Reports 221 (1950), at 229 and the Dissenting Opinion of Judge Read, *ibid.*, at 238. See also *Oppenheim*, *supra* note 4, at 1281 (‘[e]ffectiveness is relative to the object and purpose of the treaty, a decision as to which will normally first have to be made’).

⁷¹⁹ Fitzmaurice, *supra* note 76, at 19. See also Fitzmaurice, ‘*Vae victis* or woe to the negotiators: Your treaty or our ‘interpretation’ of it?’, 65 *AJIL* 358 (1971), at 373; the joint Dissenting Opinion of Judges Fitzmaurice and Spender in the *South West Africa* cases, Preliminary Objections, ICJ Reports 319 (1962), at 468, 511-13; the *Laguna de Desierto* case, 113 *ILR* 1, at 44; and Thirlway, *supra* note 91, at pp. 47-8.

⁷²⁰ Thirlway, *supra* note 91, at 46 (footnote omitted). Similarly, *Oppenheim*, *supra* note 4, at 1281, takes the view that ‘the absence of a full measure of effectiveness may be the direct result of the inability of the parties to reach agreement on fully effective provisions; in such a case the court cannot invoke the need for effectiveness in order to revise the treaty to make good the parties’ omission’.

⁷²¹ *Ibid.*, at pp. 47-8.

375. Some commentators consider the principle as possessing two limbs. To them, the first limb—‘*la règle de l’effet utile*’—involves a presumption that *individual provisions* of the treaty must have been intended to have some *use* or *effect* and that an interpretation that reduces provisions to mere surplusage is suspect.⁷²² The second—‘*la règle de l’efficacité*’—is that the *treaty as a whole* (and, necessarily, each of its provisions) must be presumed to have a *purpose*, and an interpretation denying that end would attract doubt.⁷²³

b) FIAT Practice

376. The principle of effectiveness has been frequently utilized by FIATs. The *AAP* award spoke of the principle in the following terms:

Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of a meaning ... This is simply an application of the more wide legal principle of ‘effectiveness’ which requires favouring the interpretation that gives to each treaty provision ‘effet utile’.⁷²⁴

377. The *ad hoc* Committee in *Klöckner* described the principle as a ‘customary principle of interpretation’.⁷²⁵ According to the *Eureko* tribunal, the principle of effectiveness was a ‘cardinal rule’ of treaty interpretation that required:

that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International

⁷²² See, e.g., Berlia, ‘Contribution à l’interprétation des traités’, 114 *Recueil des cours* 283 (1965), at 306 ff. Examples of this rule may be found in the merits phase of the *Corfu Channel* case, ICJ Reports 4 (1949), at 24 and the *Anglo-Iranian Oil* case, ICJ Reports 93 (1952), at 105. See also Thirlway, *supra* note 91, at 44.

⁷²³ See, e.g., Berlia, *ibid.*, at 308 ff. Examples of this rule may be found in the *Interpretation of Peace Treaties (Second Phase)* case, ICJ Reports 221 (1950), at 229; and in the *Ambatielos* case, ICJ Reports (1952), at 45. This limb appears to have a close relation to the Article 31(1) object and purpose criterion.

⁷²⁴ *AAP*, at para. 40.

⁷²⁵ *Klöckner (Annulment)*, at para. 62.

Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.⁷²⁶

378. In applying this principle, FIATs have required ‘full effect’ to be given to a provision⁷²⁷ or to the intentions of the parties.⁷²⁸ A variant of this practice has been the tendency of FIATs to avoid interpretations that deprive a treaty or its provisions of

- a) ‘any practical value’;⁷²⁹
- b) ‘any meaning’;⁷³⁰
- c) ‘any effect’;⁷³¹
- d) ‘practical content’;⁷³²
- e) ‘practical applicability’;⁷³³ or
- f) ‘any semantic content or practical utility of its own’.⁷³⁴

⁷²⁶ *Eureko*, at para. 248. No citations were made to specific international law cases. It could have referred to *AAP*, at para. 40 (Rule (E)), which expounds a similar rule and cites authority in support. See also *Noble Ventures (Award)*, at para. 50 (commenting after a reference to the Vienna Convention Rules that ‘the principle of effectiveness (*effet utile*) ... too plays an important role in interpreting treaties’). FIATs have also considered the Roman maxim *ut res magis valeat quam pereat* as having equivalence with the principle of effectiveness. See *infra* note 757. In relation to the use of the principle by domestic courts in interpreting BITs, see *Czech Republic v European Media Ventures SA*, [2007] EWHC 2851 (Comm), at para. 37.

⁷²⁷ See, e.g., *MINE (Annulment)*, at paras. 4.05-06. See also *Canfor Corporation (Decision of Preliminary Question)*, at para. 324 (‘under well-known principles of international law, every provision of an international agreement must have meaning, because it is presumed that the State Parties that negotiated and concluded that agreement intended each of its provisions to have an effect’).

⁷²⁸ See, e.g., *Amco (Jurisdiction)*, at para. 29.

⁷²⁹ *Kaiser Bauxite*, at para. 24.

⁷³⁰ *Maffezini*, at para. 36; *Lucchetti (Award)*, at para. 59; and *El Paso*, at para. 110 (holding that treaty provisions ‘must be considered to carry some legal meaning’). See also *Joy Mining*, at para. 50. The *SPP* tribunal, in relation to a domestic statute, held that ‘[u]nder general principles of statutory interpretation, a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text’. *SPP (Jurisdiction)*, at para. 89. See also *Holiday Inns*, 1 ICSID Reports at 674; and *Waste Management (Opinion)*, at 476, para. 47, and 478, para. 55.

⁷³¹ *Camuzzi (Jurisdiction)*, at para. 56.

⁷³² *Noble Ventures (Award)*, at para. 52. See also *infra* note 938.

⁷³³ *Noble Ventures (Award)*, at para. 52.

379. Other FIATs have declined to make an interpretation that would render a provision

- a) invalid;⁷³⁵
- b) ‘useless’;⁷³⁶
- c) ‘pleonastic’;⁷³⁷
- d) ‘meaningless’;⁷³⁸ or
- e) ‘destroy the internal logic of [a provision] and render much of that provision superfluous’.⁷³⁹

380. On the whole, these pronouncements have been faithful to the principle as it operates in international law.

381. FIATs have been conscious of the similarities between the object and purpose criterion and the principle of effectiveness⁷⁴⁰ and also the limitations of the principle:

The Tribunal is certainly aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect—*ut magis valeat quam pereat*. However, this principle of interpretation should not lead to confer, *a posteriori*, to a

⁷³⁴ *Tecmed*, at para.156.

⁷³⁵ *Tza Yap Shum*, at para. 188.

⁷³⁶ *American Manufacturing*, Separate Opinion of Golsong , at 42, para. 20. *El Paso*, at para. 76, spoke of the need to avoid rendering ‘the whole Treaty completely useless’. See also *Sempra Energy (Jurisdiction)*, at para. 94.

⁷³⁷ *SPP (Jurisdiction No. 2)*, at para. 94.

⁷³⁸ *Occidental Exploration (Award)*, at para. 68; *Joy Mining*, at para. 50; and *SPP (Jurisdiction No. 2)*, at para. 94.

⁷³⁹ *SPP (Jurisdiction No. 2)*, at para. 94. Note must be made that this was in relation to the interpretation of an Egyptian statute that, under certain conditions, consented to ICSID jurisdiction. See also *SGS v Pakistan*, at para. 168; *Generation Ukraine (Award)*, at para. 14.3; and *Eureko*, at para. 258.

⁷⁴⁰ *SGS v Philippines*, at para. 116 ([t]he object and purpose of the BIT supports an effective interpretation of Article X(2)). See also *MINE (Annulment)*, at paras. 4.05; *Noble Ventures (Award)*, at para. 52; *Mondev*, at para. 91; and Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’, 3(2) *Transnational Dispute Management* (2006), at 4.

provision deprived of its object and purpose a result that goes against its clear and explicit terms.⁷⁴¹

382. This warning reflects the caution expressed by the ICJ in the *Interpretation of Peace Treaties* case as noted in the International Law section above.⁷⁴² More recently, the *Renta 4* tribunal has indicated that effect need not be given to every word of a provision if that is not possible. In that case it held that ‘[t]he search to give meaning to the eight (or eleven) words that follow “relating to” in Article 10(1) [of the Spain-USSR BIT] simply cannot be allowed to deprive the remaining text of its essential positive meaning.’⁷⁴³ This is consonant with the observation of Hugh Thirlway above that the interpretation need not be effective in all circumstances. But an interpretation that deprives certain words of their effect should not be made lightly.

383. On a number of occasions FIATs have explicitly employed ‘*la règle de l’effet utile*’.⁷⁴⁴ No instance was found where an explicit application of ‘*la règle de l’efficacité*’ was made by FIATs. A reason for the lack of reference to this aspect of the interpretative process may be due to its overlap with the tribunal’s application of the Article 31(1) object and purpose criterion. Nonetheless, the *Sempre Energy* tribunal appeared to be applying ‘*la règle de l’efficacité*’ when it stated:

If the purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would devoid the Treaty of all useful effect.⁷⁴⁵

384. The FIAT awards cited in this Section demonstrate the importance and widespread use of the principle of effectiveness in the international law of treaty

⁷⁴¹ *Banro (Award)*, at para. 6. See also *Noble Ventures (Award)*, at para. 52. This passage was quoted with approval in the dissenting opinion of Alberro-Semerena in *Aguas del Tunari*, at para. 32.

⁷⁴² See *supra* note 718.

⁷⁴³ *Renta 4*, at para. 32. Article 10(1) of the Spain-USSR BIT is comprised of over 60 words.

⁷⁴⁴ *AAP*, at para. 40 (Rule (E)) and para. 52; *CSOB (Jurisdiction)*, at para. 39; *Noble Ventures (Award)*, at para. 50; *Salini v Jordan (Jurisdiction)*, at para. 95; *El Paso*, at para. 110; and *Thunderbird*, Dissenting Opinion, at para. 91.

⁷⁴⁵ *Sempre Energy (Jurisdiction)*, at para. 94.

interpretation. As useful as the principle is, care still must be exercised that does not unduly override the text of the treaty.

G. LEGAL MAXIMS

a) International Law Practice

385. Legal maxims are not anachronistic propositions of a bygone age. They encapsulate reasoning or rules of logic that have survived centuries of use. Many of them continue to be relevant in a large number of today's legal systems. An international tribunal's use of maxims to interpret treaties could be justified on the grounds that they are relevant rules of international law under Article 31(3)(c) of the Vienna Convention or supplementary means of interpretation under Article 32.⁷⁴⁶

386. The ILC's view of maxims was that the interpretation of treaties by international tribunals at one time or another used almost every 'maxim of which use is made in national systems of law in the interpretation of statutes'.⁷⁴⁷ It continued:

Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document ... Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case.⁷⁴⁸

⁷⁴⁶ *Oppenheim*, *supra* note 4, at 1275, *et seq.*, refers to a number of legal maxims in its section on supplementary means of interpretation.

⁷⁴⁷ *YILC* (1966-II), at 218, para. 3.

⁷⁴⁸ *YILC* (1966-II), at 218, para. 4. *Oppenheim*, *supra* note 4, at 1269-70, comments that Roman law maxims applied in municipal law systems:

are expressive of common sense and of normal grammatical usage, they commend themselves also in the interpretation of treaties. However, while international law permits recourse to many principles and maxims, it does not always require recourse to them. The appropriateness

b) FIAT Practice

387. FIATs have provided several practical applications of legal maxims, particularly relating to the maxim *generalia specialibus non derogant* (i.e., things general do not restrict (or detract from) things special). Take, for instance, *SGS v Philippines*. In that case, the BIT provision subject to interpretation prescribed that if consultations failed to resolve a dispute, the investor may submit the dispute either to the national courts of the host State or to ICSID or UNCITRAL arbitration. In contrast, Article 12 of the private agreement between SGS and the Philippines required, in part, that '[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila'. The tribunal, in following the maxim *generalia specialibus non derogant*, held that it was not to be presumed that the general provision in the BIT 'has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties'.⁷⁴⁹ Similarly, in *SPP (Jurisdiction)*, the tribunal used the maxim to determine that

[a] specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and Egypt, while such a bilateral treaty would in turn prevail with respect to a multilateral treaty such as the Washington Convention.⁷⁵⁰

388. In his Declaration in *SGS v Philippines*, Antonio Crivellaro contended that a qualification should be made to the *generalia specialibus* and *lex posterior* maxims:

of applying many of them depends on a variety of considerations which will determine whether, although they are accepted in international law as potentially relevant, they are also suitable for application in all the circumstances of a particular case. In such cases the principle is not so much a rule of international law as a discretionary aid ...'

⁷⁴⁹ *SGS v Philippines*, at para. 141. In a similar vein, Schreuer, *supra* note 5, at 362, has commented that '[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application'. See also *AAP*, at para. 54 ('in the absence of a specific rule provided for in the Treaty itself as *lex specialis*, the general international law rules have to assume their role as *lex generalis*') and para. 65 (holding that the *lex generalis* applies to all situations that are not covered by a specific rule). See also *AES (Jurisdiction)*, at para. 23(b); and *AAP*, Dissenting Opinion, at 302-3.

⁷⁵⁰ *SPP (Jurisdiction)*, at para. 83, citing Grotius, *De jure belli ac pacis*, Bk II, Chap. XVI, and the *Readoption of the Mavrommatis Jerusalem Concessions*, Jurisdiction, Series A, No. 11, pp. 31-32 (1924) and *Saudi Arabia v Aramco* 27 ILR 117 (1963). However, the BIT's cannot override the ICSID Convention in a way that it expands the provisions contained in that Convention. See, e.g., *Agua del Tunari*, at para. 278.

I doubt whether the Roman adagios *generalia specialibus non derogant* and *lex posterior derogat legi priori* (paras. 141 and 142 of the Decision) may be extended to the comparison between a treaty and a contract. As the Decision admits in respect of the second maxim (but the same should also apply to the first maxim), for such maxims to apply it is required that the two instruments have the same legal character and, I would add, be made by or be directly binding on the same parties.⁷⁵¹

389. No authority is cited for this call for equivalence of legal character. No comment was elicited by the majority on this issue.

390. In *SGS v Pakistan* the tribunal held that the claimant's interpretation of the umbrella clause at issue was exceedingly expansive. It took the view that the clause required a considerably higher degree of specificity before it could accept such an interpretation. The tribunal's conclusion was that the interpretative approach to be adopted was summed up by the maxim *in dubio mitius* (i.e., the interpretation of treaties in deference to the sovereignty of states).⁷⁵² The *Eureko* tribunal criticised this finding on the following grounds:

This Tribunal feels bound to add that reliance by the Tribunal in *SGS v Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties.⁷⁵³

391. The *expressio unius est exclusio alterius* rule (i.e., if something is expressed it must be taken to exclude something else) was applied by the *Waste Management* tribunal in the following way:

Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.

392. The flaws in the above type of logic were exposed in *Siemens*, where the tribunal took the view that

⁷⁵¹ *SGS v Philippines*, Supplementary Declaration, at para. 9.

⁷⁵² *SGS v Pakistan*, at para. 171. See also Chapter VI, Section H.

⁷⁵³ *Eureko*, at para. 258.

Article 4 is the only article in the [1991 Germany-Argentina BIT] that deals with compensation in case of expropriation and of war or civil unrest. If the Treaty should be interpreted as alleged by Argentina - by excluding from its application every specific situation that has not been included -, we would be bound to reach the conclusion that, in cases of discrimination, arbitrary measures, or treatment short of the just and equitable standard, there would not be a right to compensation under the Treaty - an unlikely intended result by the Contracting Parties given the Treaty's purpose. If a matter is dealt with in a provision of the Treaty and not specifically mentioned under other provisions, it does not necessarily follow that the other provisions should be considered to exclude the matter especially covered.⁷⁵⁴

393. This inherent problem in the *expressio unius* maxim calls for caution to be exercised if it is employed. An injudicious application may lead to an unwarranted limitation on the application of a treaty.⁷⁵⁵

394. Other maxims applied or discussed by FIATs include *ejusdem generis* (i.e., of the same genus);⁷⁵⁶ *ut res magis valeat quam pereat* (i.e., let the thing stand rather than fall);⁷⁵⁷ and *lex posterior derogat legi priori* (i.e., a later law repeals an earlier one).⁷⁵⁸

395. The jurisprudence referred to above shows that FIATs have contributed to international law through the practical instances in which they have applied legal maxims. Those applications have helped provide a practical context for the maxims and enhance the understanding of how those maxims operate.

⁷⁵⁴ *Siemens (Jurisdiction)*, at para. 140. See also *Vacuum Salt*, at 337, para. 29, n. 9; *Tokios (Jurisdiction)*, para. 30; *Tza Yap Shum*, at para. 207; and *Methanex (Final Award)*, Part IV, Chpt. C, at para. 14.

⁷⁵⁵ See also Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3(2) *Transnational Dispute Management* (2006), at 7 (the maxim is of limited use and that '[w]hether the mention of one item or a list of items in a provision really excludes the relevance of other items depends very much on the particular circumstances and cannot be answered in a generalised way.').

⁷⁵⁶ *Maffezini (Jurisdiction)*, at 405-6, at paras. 46-50; and *Plama (Jurisdiction)*, at paras. 36 and 189.

⁷⁵⁷ This maxim has been used synonymously with the principle of effectiveness. See, e.g., *Banro*, at para. 6; *El Paso*, at para. 110; *American Manufacturing*, Separate Opinion of Arbitrator Golsong, at 42, para. 20; *Waste Management*, Dissenting Opinion, at para. 55; and *Pan American (Preliminary Objections)*, at para. 132. See also Section Chapter V, Section F.

⁷⁵⁸ *SGS v Philippines*, at para. 143 and at para. 145 ('[i]n principle a later agreement between the same parties could override an earlier one').

Chapter VI

SOME SALIENT FEATURES

Chapter outline: The present Chapter highlights some unique or notable aspects of FIAT jurisprudence relating to the thesis subject matter. The topics to be discussed are intended to assist in evaluating the contribution FIATs have made to the corpus of the international law on treaty interpretation. Section A explores the pre-Vienna Convention rules formulated by the AAP tribunal. Section B examines the failure of FIATs to apply the Vienna Convention Rules or misapplications of those Rules. Section C studies the means by which FIATs interpret unilateral declarations of States consenting to ICSID arbitration. Sections D and E analyse the divergent FIAT interpretations of umbrella clauses and most favoured nations clauses. Section F draws attention to the problems resulting from investors' lack of access to investment treaty preparatory work. Section G discusses the issue of interpreting investment treaties on the basis that they have a pro-investor bias. Liberal and restrictive approaches to treaty interpretation are dealt with in Section H. Finally, Section I appraises the interpretation of investment treaty provisions requiring negotiation periods prior to the commencement of an arbitration.

A. THE AAP RULES

396. The AAP award warrants separate discussion in this Chapter because it formulated in some detail six rules that were commonly used prior to the acceptance of the Vienna Convention Rules. In international arbitral awards, or for that matter decisions of other international courts and tribunals, it is rare indeed to have such an

extensive self-styled formulation of pre-Vienna Rules treaty interpretation principles.⁷⁵⁹ This makes the *AAP* award unique.

397. The tribunal in *AAP* commenced its discussion on treaty interpretation stating that it must construe treaties

in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by *l'Institut de Droit International* in its General Session in 1956, and as codified in Article 31 of the Vienna Convention on the Law of Treaties.⁷⁶⁰

398. Curiously, the tribunal did not proceed to discuss the text of Article 31 but proceeded to state that the 'basic rule' to be followed was contained in the *Van Bokkelen* case, which held that 'for the interpretation of treaty language and intention, whenever controversy arises, reference must be made to the law of nations and to international jurisprudence'.⁷⁶¹ The tribunal continued by formulating '[t]he other rules that should guide the Tribunal in adjudicating the interpretation issues raised in the present arbitration case':⁷⁶²

Rule (A) 'The first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. When a deed is worded in a clear and precise terms [*sic.*], when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents'...^[763]

Rule (B) 'In the interpretation of treaties ... we ought not to deviate from the common use of the language unless we have very strong reasons for it (...) words are only designed to

⁷⁵⁹ The *Georges Pinson* case is one of the most prominent arbitration awards that contains a detailed formulation of pre-Vienna Convention treaty interpretation rules, but it was issued more than 80 years ago. *Georges Pinson*, France-Mexico Claims Commission, (1927-8) *Annual Digest* 426, at 426-7; 5 *RIAA* 327 (1928), at 422.

⁷⁶⁰ *AAP*, at para. 38.

⁷⁶¹ *AAP*, at para. 39, citing the *Van Bokkelen* case, Award of 4 December 1888, in Moore's *History and Digest of International Arbitration* 1807 (1898), Vol. II, at 1849, and *Repertory of International Arbitral Jurisprudence*, Vol I, at 13.

⁷⁶² *AAP*, at para. 40.

⁷⁶³ Quoting Vattel. The citation the tribunal provides is 'Vattel's Chapter on Interpretation of Treaties—Book 2, chapter 17'. It fails to indicate the quotation is from Vattel's *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, (1758).

express the thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to that expression' ...⁷⁶⁴

Rule (C) In cases where the linguistic interpretation of a given text seems inadequate or the wording thereof is ambiguous, there should be recourse to the integral context of the Treaty in order to provide an interpretation that takes into consideration what is normally called: 'le sens général, l'esprit du Traité', or 'son économie general' ...

Rule (D) In addition to the 'integral context', 'object and intent', 'spirit', 'objectives', 'comprehensive construction of the treaty as a whole', recourse to the rules and principles of international law has to be considered a necessary factor providing guidance within the process of treaty interpretation ...

Rule (E) Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of a meaning ... This is simply an application of the more wide legal principle of 'effectiveness' which requires favouring the interpretation that gives to each treaty provision 'effet utile'.

Rule (F) 'When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration'⁷⁶⁵ ... Thus, establishing the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation.⁷⁶⁶

399. After setting out the foregoing rules, the tribunal viewed its task as follows:

In the light of the above mentioned canons of interpretation, the relevant provisions of the Sri Lanka/UK Bilateral Investment Treaty have to be identified, each provision construed separately, examined within the global context of the Treaty, in order to determine the proper interpretation of each text, as well as its scope of application in relation to the other treaty provisions and with regard to the various general rules and principles of international law not specifically referred to in the Treaty itself.⁷⁶⁷

400. Each of the *AAP* tribunal's self-styled rules were supported by numerous references to sources, many of which were quoted directly from the *Repertory of International Arbitral Jurisprudence* and the work of the Institute of International Law at its Granada Session in 1956. The rules, however, fail to make reference to

⁷⁶⁴ Quoting Vattel. Here the tribunal does not provide any reference to the primary source, except to state that it was relied upon by the USA-Venezuela Mixed Commission in the *Howland* case, and then it refers to an excerpt in *Repertory of International Arbitral Jurisprudence*, Vol. I: 1794-1918, at 16. The opinions of all three commissioners in *Howland's* case are fully reported in Moore's *History and Digest of International Arbitrations*, Vol. IV, at 3616-64.

⁷⁶⁵ Quoting the *Elton* case, Mexico-US General Claims Commission of 1929, *Repertory of International Arbitral Jurisprudence*, Vol. II, p. 35.

⁷⁶⁶ *AAP*, at para. 40 (footnotes omitted).

⁷⁶⁷ *AAP*, at para. 41.

Article 32 of the Vienna Convention, any subsequent conduct of the parties, relevant PCIJ or ICJ cases (it does, nonetheless, refer to pleadings before those courts), the ILC Commentary, Ambassador Yasseen's 1973 Hague Academy Lectures on the Vienna Convention Rules or Judge Fitzmaurice's seminal articles on the ICJ's practice relating to treaty interpretation in the *British Year Book of International Law*. The failure to mention these important materials and points in the tribunal's detailed elucidation of treaty interpretation rules is somewhat perplexing.⁷⁶⁸ All of the materials would have been readily available to the tribunal but perhaps not pleaded by the parties. Moreover, it is difficult to understand why the tribunal set out a selective patchwork of treaty interpretation jurisprudence rather than simply relying on the Vienna Convention Rules or even the Institute's rules.

401. In fairness to the tribunal, it should be pointed out that the bulk of the pleadings in *AAP* appears to have been made in 1988 and the award was issued in 1990.⁷⁶⁹ Perhaps it is only with the benefit of hindsight, particularly the subsequent wide-spread use and recognition of the Vienna Convention Rules, that the present critical observations can be made. But nevertheless it would have been expected that the second edition of Sinclair's work on the Vienna Convention (published in 1984) was available to the counsel involved and the members of the tribunal. Sinclair there expressed the view that Articles 31 to 33 of the Vienna Convention were by then, without doubt, reflective of the principles of customary international law.⁷⁷⁰

⁷⁶⁸ One could say, in fairness to the tribunal, that it limited itself only to the rules that it considered to be relevant to its task. See, e.g., the indication by the tribunal that the rules it formulated were to guide it in adjudicating the interpretation issues raised in that particular case and that the preparatory work was not before it. *AAP*, at paras. 40 and 51.

⁷⁶⁹ *AAP*, at para. 6 *et seq.*

⁷⁷⁰ Sinclair, *supra* note 6, at 153. See also Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 167. It is also relevant to note here that the ICJ's first indication that Articles 31 to 33 reflected rules of customary international law appeared in its 1991 judgment in the *Case concerning the Arbitral Award of 31 July 1989*, ICJ Reports 53 (1991), at 69-70, para. 48.

402. Relatively little reference has been had by other FIATs to the interpretative rules as formulated in the *AAP* case.⁷⁷¹ One may speculate that the rules formulated in *AAP* have declined in relevance since the ascendancy of the Vienna Convention Rules as customary rules of treaty interpretation. Not only are those Rules now almost universally accepted as first order treaty interpretation rules, they are also more straightforward and systematic to apply than the rules articulated by the *AAP* tribunal. Further, the *AAP* rules are incomplete both as to the substance of the rules (as mentioned above, they do not cover preparatory work or subsequent practice) and the jurisprudence on which they are based.

403. The *AAP* rules serve to illuminate the type of dilemma faced by treaty interpreters prior to the Vienna Convention Rules. There existed no real guidance as to the selection of the rules to be applied and no indication as to the stage of the interpretation at which any given rule could be deployed. Consequently, much discretion rested on the tribunal as to rule selection and the hierarchy that would dictate the order of their application. Undoubtedly, valuable time and energy of counsel and the arbitral tribunal would have been expended by this uncertain process.

404. This is not to suggest that the Vienna Convention Rules are problem free. Determining how those Rules should be applied raises difficult issues, for example, the weight to be allocated to each of its criteria. The Rules do, however, lay down a basic framework and identify the applicable rules. As a consequence, they have alleviated to a significant degree the need for comprehensive pleadings by parties on the subject and the need for tribunals to deliberate as to the rules to be applied. In this respect, there is a good deal of merit in Georg Schwarzenberger's observation that 'any agreed mode of tackling questions of interpretation, however imperfect, is preferable to the absence of, or widespread uncertainty regarding, such rules'.⁷⁷²

⁷⁷¹ Exceptions are *Lucchetti (Award)*, at para. 59, n. 7 (referring to *AAP* Rule (E)); and *Methanex (Final Award)*, at Part II, Chpt. B, at para. 16 (referring to *AAP* Rule (F)).

⁷⁷² Schwarzenberger, *International Law and Order* (1971), at pp. 110–128.

B. FAILURE TO APPLY VIENNA CONVENTION RULES

405. The Vienna Convention Rules are couched in mandatory language. Article 31(1) commences by stating that a ‘treaty *shall* be interpreted’ in accordance with the criteria that follow.⁷⁷³ Notwithstanding this instruction by the Vienna Convention and despite the numerous acknowledgements by FIATs that the Vienna Convention Rules are expressive of customary international law, a number of FIATs reviewed have failed to apply or rely on those Rules.⁷⁷⁴ Tribunals must be cautious of this practice. In this regard, it is appropriate to note Professor Reisman’s warning: ‘[a] failure to apply the rules of interpretation perforce distorts the resulting interpretation of the parties’ agreement and is a species of the application of the wrong law.’⁷⁷⁵ Indeed, the *ad hoc* Committee’s decision in *Malaysian Historical Salvors* suggests that a misapplication of general rules of interpretation in an ICSID tribunal’s award may have a significant influence on the annulment of an ICSID award based on the ICSID Convention’s Article 52(1)(b) manifest excess of powers ground. In that case, the *ad hoc* Committee considered as extremely relevant the failure of the original tribunal to take into account the preparatory work of the ICSID Convention in the tribunal’s

⁷⁷³ Emphasis added. Articles 31(3) and (4) in the English version also employ the word ‘shall’.

⁷⁷⁴ See, e.g., *ADF (Award)*, at para. 148, n. 153 (referring to Articles 31 and 32 in a footnote but interpreting NAFTA mostly without reference to the Vienna Convention Rules); *Metalclad (Award)*, at para. 70 (paraphrasing most of the provisions of Article 31 but not appearing to adhere, or at least refer back to the Vienna Convention Rules, to any great degree in its analysis); *Waste Management*, 5 ICSID Reports, at para. 8, *et seq.* (stating that Article 31 should guide the interpretation of a treaty but thereafter failing to refer to or apply it—in contrast, the interpretative analysis by Keith Highet in his Dissenting Opinion at 462 provides a better and clearer methodology, which is closer to the process prescribed by Article 31, see, e.g., at paras. 33 and 56); *CME (Final Award)*, at para. 496 (referring to Article 31 but not applying it in any ostensible manner); *Klöckner (Annulment)*, at para. 179; and *SGS v Pakistan*, at para. 161. Examples may also be found where in the same award the Vienna Convention Rules are applied by a FIAT to certain interpretations of treaty provisions but not to others. One example of this practice is provided in *Lauder*, in which the tribunal appeared to be applying those Rules in one instance (at para. 292) and not in two other places (paras. 200 and 219 *et seq.*). See also, *SGS v Pakistan*, at paras. 161 and 164; and *United States v Canada*, LCIA Case No. 81010, Expert Opinion by Professor W. Michael Riesman, ‘Opinion with respect to Selected International Legal Problems in LCIA Case No. 7941’, 1 May 2009, at para. 7 (the Vienna Convention Rules ‘have become something of a *clause de style* in international arbitral awards, where they are often briefly referred to or ... solemnly reproduced verbatim, and then largely ignored.’), available at http://ita.law.uvic.ca/expert_opinions.htm.

⁷⁷⁵ *United States v Canada*, LCIA Case No. 81010, Expert Opinion by Professor W. Michael Riesman, ‘Opinion with respect to Selected International Legal Problems in LCIA Case No. 7941’, 1 May 2009, at para. 7, available at http://ita.law.uvic.ca/expert_opinions.htm.

interpretation of Article 25 of that treaty.⁷⁷⁶ Additionally, the *ad hoc* Committee decision in *Lucchetti* hints that a serious failure to have regard to ‘significant elements’ of the Vienna Convention Rules may give rise to an annulment claim under Article 52(1)(b). In its findings in respect of this provision, the *ad hoc* Committee said the following:

Although the Tribunal’s interpretation of Article 2 of the BIT, as it appears in the Award, does not reflect all relevant aspects of treaty interpretation according to the Vienna Convention, the Committee has no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation. In any event, the Committee ... cannot find that the Tribunal’s reasoning in the Award, although summary and somewhat simplified in relation to the Vienna Convention, constituted an excess – and even less a manifest excess – of the Tribunal’s powers within the meaning of Article 52(1)(b) of the Convention.⁷⁷⁷

406. The Dissenting Opinion of Sir Franklin Berman went further. In his view, the tribunal must not only apply the proper rules of interpretation but must also adequately explain what it is doing in the interpretative process. On this point, he considered the original award to be so defective that he was prepared to annul it.⁷⁷⁸

407. Logic and good sense are frequently invoked as substitutes for the Vienna Convention Rules. In *Siemens*, the tribunal was called upon to interpret, inter alia, Article 3(2) of the 2001 Germany-Argentina BIT, which provides:

None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.⁷⁷⁹

408. The tribunal considered that it was ‘just a matter of plain common sense’ that this clause dealing with activities in relation to investments—without explicit reference to investors—still covered investors because those activities needed to be

⁷⁷⁶ *Malaysian Historical Salvors (Annulment)*, at para. 80.

⁷⁷⁷ *Lucchetti (Annulment)*, at para. 116.

⁷⁷⁸ *Lucchetti (Annulment)*, Dissenting Opinion of Sir Franklin Berman, at para. 6.

⁷⁷⁹ Translation in *Siemens (Jurisdiction)*, at para. 82.

undertaken by a person, whether physical or legal.⁷⁸⁰ Aust's view is relevant here: '[g]ood interpretation is often no more than the application of common sense'.⁷⁸¹ A means of providing a legal basis for such summary approaches may be to assert that they constitute simple, unconscious applications of the Article 31(1) ordinary meaning criterion.⁷⁸²

409. Interpretations that do not apply the Vienna Convention Rules often occur in situations in which the terms at issue are relatively straightforward or uncontroversial. For example, determinations as to the meaning conveyed by simple terms such as 'and', 'may' or 'shall be' typically do not involve reference to the Vienna Convention Rules.⁷⁸³ In such cases any detailed interpretative analysis could be considered inefficient or uneconomical in relation to the end to be attained.⁷⁸⁴ It may also be said that many of these summary interpretations are based on common sense or intuition. The *Plama* tribunal drew attention to this issue when it noted 'as with many issues of

⁷⁸⁰ *Siemens (Jurisdiction)*, at para. 92; and *Methanex (Partial Award)*, at para. 137. See also *Pope & Talbot (Merits, Phase 2)*, at para. 38; and *TSA Spectrum (Award)*, at para. 145. With respect to the 'rational and logical interpretation' of commercial documents, see *Tecmed*, at para. 88. See also Lord Hoffmann speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98, at 114 (House of Lords), in which he remarked that the modern-day contract interpretation principles generally followed 'common sense principles by which any serious utterance would be interpreted in ordinary life'.

⁷⁸¹ Aust, *supra* note 4, at 200. See also Mann, 'British Treaties for the Promotion and Protection of Investments', 52 *BYBIL* 241 (1981) (commenting that BITs 'include many terms which involve a measure of evaluation and of judgment and may give rise to disputes about degree rather than terminology').

⁷⁸² See, e.g., *Siemens (Jurisdiction)*, at para. 93, where the interpretation consisted of stating that there was a 'simple ordinary meaning' of a provision and without a great deal of other reasoning. See also *YILC* (1966-II), at 218, para. 3.

⁷⁸³ In respect of the cumulative effect of 'and', see, e.g., *Plama (Jurisdiction)*, at para. 143; and *Lauder*, at para. 219. Contrast these cases with *Sempra Energy (Jurisdiction)*, at paras. 41 and 45, which noted the use of 'and' between Article 25(2)(a) and (b) of the ICSID Convention signified that sub-paragraph (2)(b) was an alternative (i.e., meaning "or") and not cumulative. Concerning the discretion afforded to the interpreter by the word 'may', see *Wena Hotels (Annulment)*, at para. 39. In regard to an interpretation of 'shall be', see *SPP (Jurisdiction No. 2)*, at para. 74.

⁷⁸⁴ See, e.g., *Lauder*, at para. 159. See also *Kaiser Bauxite*, at para. 16 in relation to an abridged interpretation of an investor-State agreement.

disputed interpretation turning on a relatively few words, it is a short point of almost first impression'.⁷⁸⁵

410. Concerning the ICSID Convention Article 52(1)(b) manifest excess of powers annulment ground, the tribunal in *Wena Hotels* took the view that this excess 'must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.'⁷⁸⁶ But interpreters must be careful; seemingly simple phrases such as 'relate to' may require many pages of analysis to understand their precise meaning.⁷⁸⁷

411. Other criteria not strictly subsumed within the explicit criteria prescribed in Articles 31 and 32 of the Vienna Convention but used in arriving at an interpretation include:

- a) justice and fairness;⁷⁸⁸
- b) policy implications;⁷⁸⁹
- c) reasonableness;⁷⁹⁰

⁷⁸⁵ *Plama (Jurisdiction)*, at para. 160.

⁷⁸⁶ *Wena Hotels (Annulment)*, at paras. 26 and 58. This approach may also be seen as an application of the ordinary meaning criterion. See also *Methanex (Partial Award)*, at para. 129.

⁷⁸⁷ See the *Methanex (Partial Award)*, in which the tribunal devotes paras. 127-147 to ascertain the meaning of the phrase 'relating to' in Article 1101(1) of the NAFTA. See also the interpretation of 'and' as signifying an alternative rather than a cumulative conjunction in *Sempra Energy (Jurisdiction)*, in paras. 41 and 45.

⁷⁸⁸ *Plama (Jurisdiction)*, at para. 149; *Metalclad (Award)*, at para. 67; and *Corn Products (Order)*.

⁷⁸⁹ *Maffezini (Jurisdiction)*, at paras. 62-63; *CME (Final Award)*, at para. 413; *SD Myers*, at paras. 261-3. See also the approval of the Maffezini decision in *Sempra Energy (Jurisdiction)*, at para. 144; *SD Myers*, at paras. 261-263; *Olguin*, at para. 73; *Loewen (Final Award)*, at para. 160 (implying a rule of 'judicial finality' not explicitly included in the treaty); and *Banro*, at para. 24.

⁷⁹⁰ *Plama (Jurisdiction)*, at para. 157; *Pope & Talbot (Interim Award)*, at para. 104; *Amco (Jurisdiction)*, at para. 24; Dissenting Opinion in *Waste Management (Opinion)*, at para. 44; *Aucoven (Jurisdiction)*, at paras. 97, 99 and 116; *SGS v Pakistan*, at para. 171. For references by ICSID *ad hoc* Committees to reasonableness in the interpretation of Article 52(1)(e) of the ICSID Convention, see *Klöckner (Annulment)*, at para. 120; and *Amco (Annulment)*, at para. 43. See also the arguments of Argentina in *CMS (Jurisdiction)*, at para. 83 (these arguments, however, were not accepted by the tribunal).

- d) practical or legal consequences;⁷⁹¹
- e) efficiency;⁷⁹² and
- f) reference to the particular facts of the case.⁷⁹³

412. This resort to other factors suggests a strict application of the Vienna Convention Rules may be less important to the tribunal in some instances than in others. Some of those factors may also be an implicit invocation of one or more of the Article 31(1) good faith, ordinary meaning, contextual or object and purpose criteria. The criticism that may be levelled against taking into account the above factors is that it deflects the focus of the interpreter from the actual text of the treaty and imposes

⁷⁹¹ *Plama (Jurisdiction)*, at paras. 157 and 219; *SD Myers*, at paras. 259-263; *SGS v Pakistan*, at paras. 167-8; *SGS v Philippines*, at paras. 126 and 148; *Sempra Energy (Jurisdiction)*, at para. 77; *Aguas del Tunari*, at para. 246; *Methanex (Partial Award)*, at paras. 137-9; *Waste Management (Award)*, at para. 15; Prosper Weil's Dissenting Opinion in *Tokios (Opinion)*, at paras. 21, 23 and 30; *El Paso*, at paras. 77 and 82; Dissenting Opinion of Jerzy Rajski in *Eureko*, at para. 11; and *CSOB (Jurisdiction)*, at para. 58.

Pope & Talbot (Merits Phase 2), at paras. 117-118 refers to a 'practical reason' for adopting an interpretation, noting that it would not render an interpretation that would lead to a 'patently absurd result' and at para. 252 provides a good example of an effects-based analysis in which it was concerned with whether there would be compliance with the treaty.

For similar attitudes in international law generally, see Sinclair, *supra* note 6, at 121 ('[t]he true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text'); and Shearer, *Starke's International Law* (1994), at 436-437.

On occasion, the consequence of an interpretation has been considered as constituting part of the good faith criterion found in Article 31(1) of the Vienna Convention. See, e.g., *CSOB (Jurisdiction)*, at paras. 34; *SOABI (Award)*, at para. 4.10; and *CSOB (Further Decision on Jurisdiction)*, at para. 24.

Professor Brownlie's Separate Opinion in *CME (Final Award)*, is worth special consideration here. There he remarked that '[t]he Czech Republic should have the benefit of civilized modern standards in the treatment of States. Even States which have been held responsible for wars of aggression and crimes against humanity are not subjected to economic ruin ... It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' of the Czech Republic', at para 77-78, quoting the Chamber of the ICJ in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports 246 (1984), at 342, para. 237.

⁷⁹² *Metalclad (Award)*, at para. 67 (holding that a different interpretation to the one adopted 'would lead to inefficiency and inequity'). See also *Czech Republic v. European Media Ventures SA*, [2007] EWHC 2851 (Comm) (Eng.), at para. 49.

⁷⁹³ See, e.g., *Mondev*, at para. 118 (in interpreting what was fair and equitable treatment under NAFTA Article 1105 the tribunal observed '[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case'). See also *Kaiser Bauxite*, at para. 17. This may be considered also an application of the treaty, as opposed to its interpretation, or an application of the context criterion.

conditions or limitations that were not intended by the parties to the treaty. Having said that, it must also be noted that frequently these non-Vienna Convention factors are discussed in conjunction with Article 31 criteria.⁷⁹⁴

413. Tribunals that do not refer to all the Article 31 and 32 criteria generally appear to mention only those criteria they consider as relevant. For example, in *Lauder*, the tribunal adopted the following approach to interpretation: ‘As with any treaty, the Treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion (Vienna Convention on the Law of Treaties, Articles 31 and 32).’⁷⁹⁵ Conversely, in *Duke v Ecuador*, the tribunal stated that Article 31(1) ‘requires interpretation to be “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty” without mentioning the context or the object and purpose.’⁷⁹⁶ The failure to make reference to all Article 31 and 32 criteria is plainly visible from such examples. This approach could run the risk of neglecting different meanings and nuances that could be unveiled by, for example, the context and the object and purpose criteria. However, it would be inefficient to require tribunals to apply explicitly every criterion in the Vienna Convention Rules in each of its interpretations, especially if they were not highly relevant for the outcome of the interpretation. Sometimes principle must give way to practicality if the system of dispute resolution is to function smoothly and effectively.⁷⁹⁷ If an uncontroversial solution can be achieved from a summary interpretation (which is not fundamentally at variance with the Vienna Convention Rules), this should not be discouraged.

⁷⁹⁴ *Methanex (Partial Award)*, at para. 137 (considering the context together with common sense); *Plama (Jurisdiction)*, at para 149 (considering the object and purpose together with notions of justice); and *Siemens (Jurisdiction)*, at para. 92 (considering the purpose together with common sense).

⁷⁹⁵ *Lauder*, at para. 292.

⁷⁹⁶ *Duke v Ecuador*, at para. 318. An approach even more concise than that adopted in *Lauder* is found in *Tecmed*. The tribunal there construed a BIT provision simply by ‘interpreting its terms according to the ordinary meaning given to them’. *Tecmed*, at para. 121. See also *Phoenix*, at para. 79.

⁷⁹⁷ The observation of Judge Brower in his Concurring and Dissenting Opinion in *McCullough & Co., Inc. v Iranian Ministry of Post* has relevance here: ‘the struggle for perfection, as so often, must be tempered by competing considerations, both of right and of practicality’. 11 Iran-US CTR 3 (1986-II), at 42-43, paras. 24-25.

414. Although the practice is extremely rare in FIAT case law, domestic rules pertaining to statutory interpretation have on occasion been used to interpret treaties. In *Pope & Talbot (Merits, Phase 2)*, for example, the tribunal referred to a domestic treatise on statutory interpretation—Sutherland, *Statutory Construction*—in support of a ‘general principle of interpretation’ in relation to the application of plural and singular form of words, which principle it applied to the interpretation of the NAFTA.⁷⁹⁸ This recourse to domestic law where no guidance exists in international law should not (to the extent it is consistent with the broad parameters of the Vienna Convention Rules) be controversial. As mentioned earlier in this thesis, municipal law rules played an important role in the early development of treaty interpretation principles.⁷⁹⁹

415. In the *Lucchetti* annulment decision, the *ad hoc* Committee appeared to indicate that had it been provided information as to the intention of the State parties to the Chile-Peru BIT at the time of that BIT’s conclusion, this would have been considered in its decision. It further noted that scarce information was submitted as to the views of Chile (the non-disputing party) as to its interpretation of the BIT. As a consequence, the Committee observed that it was necessary ‘to interpret the relevant clause according to general principles of international law, as set out primarily in the Vienna Convention’.⁸⁰⁰ The reliance on statements of State parties to a treaty as to what they consider to be the intention of the signatories prior to the deployment of Article 31 does not comply with the requisite application sequence of the Vienna Convention Rules. Post-dispute statements by parties to a treaty as to its meaning may fall within Article 31(3) of the Vienna Convention but care must be exercised when a party to a treaty dispute (in this case the investor) was not present during the treaty’s negotiation. The two State parties to the treaty may have a common self-interest in interpreting that instrument, which interest is in conflict with the interests of

⁷⁹⁸ *Pope & Talbot (Merits, Phase 2)*, at para. 37.

⁷⁹⁹ See *supra* note 71.

⁸⁰⁰ *Lucchetti (Annulment)*, at para. 79.

the investor. Allowing such interpretations would detract from the legitimacy and spirit of investment treaty dispute resolution.

416. Another practice that is inconsistent with the Vienna Convention Rules is the application of Article 32 prior to exhausting the interpretative steps stipulated in Article 31. This is discussed in Chapter IV.

417. A thought-provoking alternative to the Vienna Convention Rules is found in *Lemire v Ukraine*.⁸⁰¹ It involved an ‘Agreement on the Dispute Settlement’ between an investor and the Ukrainian Minister of Economy. Although relating to international business transactions rather than treaties, its provisions on interpretation are of special interest to this thesis:

22. This Agreement shall be interpreted according to the common intent of the Parties. If such an intention cannot be established, the Agreement shall be interpreted according to the meaning that reasonable persons of the same kind as the Parties would give to it in the same circumstances.

The Statement and other actions of a Party shall be interpreted according to that Party’s intention if the other Party was aware of, or should have been aware of that intention.

If the preceding paragraph is not applicable, such statements and other actions of a Party shall be interpreted according to the meaning that a reasonable person of the same kind as the other Party would give to it in the same circumstances.

23. For interpreting this Agreement all the circumstances shall be taken into consideration, including the following:

- (a) preliminary negotiations between the Parties;
- (b) the practices which the Parties have established in their relations;
- (c) the conduct of the parties following the conclusion of the Agreement;
- (d) the nature and purpose of the Agreement;
- (e) the meanings commonly given to the terms and expressions in the business concerned;
- (f) usages.

Terms and conditions of the present Agreement shall be interpreted in such a way that all of such terms are deemed effective without making void any of them.

418. Aside from its reference to the intentions of the parties, these terms contain two important concepts not present in the Vienna Convention Rules. These are the

⁸⁰¹ 6 *ICSID Rep.* 60 (2004).

reference to ‘the meaning that reasonable persons of the same kind as the Parties would give to it in the same circumstances’ and to the principle of effectiveness. These appear to be two very practical instructions to treaty interpreters, which are absent (at least in express terms) in the Vienna Convention Rules. However, in relation to the first, it would be a concept difficult to apply to States. Problems would arise as to what type of person should be used in the test, e.g., would it be a government minister or an expert in the subject matter of the treaty who negotiated the text?

C. UNILATERAL DECLARATIONS CONSENTING TO ICSID ARBITRATION

419. In *SPP* the claimants contended that Article 8 of Egyptian Law No. 43 of 1974 (‘Law No. 43’) constituted Egypt’s consent to ICSID arbitration and that this local law must be considered from an international perspective rather than within a domestic framework.⁸⁰² On this basis, they asserted that this domestic law should be construed by applying the Vienna Convention Rules.

420. In addressing this contention, the tribunal held that it could not accept that the local law should be interpreted by application of treaty interpretation rules. It observed ‘[u]nlike a treaty, Law No. 43 is not the result of negotiations between two or more States, but rather by the result of a unilateral act by a single State’.⁸⁰³ The tribunal added that while that State was entitled to interpret its own legislation, which interpretation was entitled to considerable weight,

the jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that a sovereign State’s interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues.⁸⁰⁴

⁸⁰² *SPP (Jurisdiction No. 2)*, at para. 56.

⁸⁰³ *SPP (Jurisdiction No. 2)*, at para. 59.

⁸⁰⁴ *SPP (Jurisdiction No. 2)*, at para. 60, citing *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, PCIJ Series A/B, No. 77 (1939), p. 64; and *Agean Sea Continental Shelf, Judgment*, ICJ

421. The tribunal ultimately took the view that because the domestic law was alleged to be a unilateral declaration pertaining to the Centre's jurisdiction, it would

apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.⁸⁰⁵

422. The tribunal proceeded to state that '[t]he starting point in statutory interpretation, as in the interpretation of treaties and unilateral declarations, is the ordinary or grammatical meaning of the terms used'.⁸⁰⁶ After a detailed examination of the text of the law at issue, the tribunal proceeded to address Egypt's argument that Article 8 of the Egyptian Law No. 43 should be interpreted in light of the historical reluctance of Egypt to submit to the jurisdiction of international tribunals. The tribunal responded by stating that

[i]t is clear that, in interpreting a unilateral declaration [in this case a domestic law containing an offer to foreign investors to submit investment disputes to ICSID] that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it made the declaration.⁸⁰⁷

423. This approach is consistent with ICJ jurisprudence relating to interpretation of unilateral declarations. The ICJ gives a good deal of weight to the intentions of the party making the declaration and does not adhere strictly to all the criteria in the Vienna Convention Rules.⁸⁰⁸

Reports 3 (1978), and also adding that to conclude otherwise would contravene Article 41(1) of the ICSID Convention.

⁸⁰⁵ *SPP (Jurisdiction No. 2)*, at para. 61. As to the legal effect of unilateral declarations in public international law, the tribunal cited *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US), ICJ Reports 14 (1986). In this regard, see also *CSOB (Jurisdiction)*, at para. 46.

⁸⁰⁶ *SPP (Jurisdiction No. 2)*, at para 74.

⁸⁰⁷ *SPP (Jurisdiction No. 2)*, at para. 107, citing *Anglo Iranian Oil Co.* ICJ Reports (1951), at 104; *Rights of Minorities in Upper Silesia*, PCIJ, Ser. A, No. 15 (1928), at 22; and *Phosphates in Morocco*, PCIJ Ser. A/B, No. 74 (1938), at 22-24.

⁸⁰⁸ See, e.g., *Fisheries Jurisdiction* (Spain v Canada), Jurisdiction, ICJ Reports 432 (1998), at para. 49:

The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but

424. In the *SPP* tribunal's conclusion, it recognised that, historically, Egypt was averse to the notion of submitting its disputes to the jurisdiction of foreign or international tribunals but considered that this must be viewed in the light of the major new economic policy Egypt embarked upon in 1971—the year Egypt became a party to the ICSID Convention—designed to attract foreign investment; and in this context, the Egyptian legislation subject to interpretation had the purpose of promoting foreign investment.

425. The dissenting opinion of Dr El Mahdi disagreed with what he saw as the tribunal's use of treaty interpretation rules to construe domestic Egyptian law:

The international law rules of interpretation of treaties codified in Articles 31 and 32 of the Vienna Convention of 1969 on the law of treaties cannot be applied *mutatis mutandis* to the interpretation of Egypt's Law No. 43/74. Such rules are conceived as applicable to treaties and other contractually binding obligations governed by the fundamental rule of *pacta sunt servanda*. Contrarily, with regard to the interpretation of a text of law, there is no place for a search of a common intention. Article 1 of the Egyptian Civil Code stipulates that Legislative provisions are applicable to all issues which are covered by these provisions, in text and content.⁸⁰⁹

426. Dr El Mahdi proceeded to apply a 'general rule of interpretation', which he described as follows: 'a sentence that figures in a law or statute must be construed to have meaning and sense' and referred to the *travaux* of the domestic Egyptian law.⁸¹⁰ He later observed that the *effet utile* of a provision warrants that it must have a reasonable meaning.⁸¹¹

427. This dissenting opinion is unconvincing for a number of reasons. First, Dr El Mahdi fails to give due regard to the real function of the Egyptian law in dispute (i.e., effectively a unilateral declaration in relation to ICSID jurisdiction)—it focuses

also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.

⁸⁰⁹ *SPP (Opinion)*, at p. 170, para 12.

⁸¹⁰ *SPP (Opinion)*, at pp. 174 and 177, paras. 20 and 27 ('the Tribunal cannot for the interpretation of that Law have recourse to, or rely upon, other materials than the text of the Law itself and, if the necessity arises, the *travaux préparatoires* to elucidate what may seem ambiguous in the text. It is not admissible for the interpretation of a Law to have recourse to, or rely upon, such other materials as the executive regulations and/or *a fortiori* upon the investment brochures or the like').

⁸¹¹ *SPP (Opinion)*, at p. 187, para. 6 (in newly renumbered second part of the dissent).

exclusively on the form in which the law exists (i.e., a domestic law).⁸¹² Secondly, the interpretative rules applied by the majority were not strictly the Vienna Convention Rules but based more on those international rules that are applied to interpret unilateral declarations (particularly those accepting jurisdiction of the ICJ). These rules are well suited to interpreting statements such as the Egyptian law at issue, which did not express a common intention of two or more parties. Thirdly, to apply international law or practice to the interpretation of these documents adds more certainty and neutrality to the dispute settlement mechanism, which avoids the possibility of the application of unfamiliar or idiosyncratic domestic rules of interpretation. Fourthly, the host State is not given an unfair advantage by the application of rules for interpreting unilateral declarations because those rules give significant weight to the intention of the declaring State rather than emphasising the text of the declaration.

428. A different approach was adopted in *Tradex*. The tribunal there held that a 1993 Albanian law represented Albania's unilateral consent to ICSID arbitration in certain circumstances. In interpreting this law, the tribunal did not explicitly state it was applying a specific rule of interpretation. Rather, it appeared to make a common sense 'evaluation of the wording' of the Albanian law.⁸¹³ Among the interpretative considerations it took into account were that the domestic law used similar terms to those that were frequently used in arbitration clauses,⁸¹⁴ the context as provided by different provisions of the law,⁸¹⁵ the perceived 'legislative intent' of the law,⁸¹⁶ and the progressive evolution of Albanian investment law.⁸¹⁷

⁸¹² The law was somewhat unique because it (or at least Article 8) gave rights solely to foreign investors, not Egyptian citizens.

⁸¹³ *Tradex (Jurisdiction)*, at 65.

⁸¹⁴ *Tradex (Jurisdiction)*, at 65. The example provided is the Model Arbitration Clause recommended by UNCITRAL.

⁸¹⁵ *Tradex (Jurisdiction)*, at 65-6.

⁸¹⁶ *Tradex (Jurisdiction)*, at 66.

⁸¹⁷ *Tradex (Jurisdiction)*, at 67. The *Tradex* award on the merits, revisited the issue. In interpreting the 1993 Albanian law, the tribunal stated that in accordance with Article 42(1) of the ICSID Convention it

D. UMBRELLA CLAUSES

429. A divisive issue in investment treaty arbitration concerns whether an investor-State contract coupled with an applicable BIT containing an umbrella clause may elevate an investor's claim under the contract into a treaty claim under the BIT.⁸¹⁸ Umbrella clauses are broad commitments by States pursuant to which they undertake to observe any obligation they may have entered into with regard to foreign investments.⁸¹⁹ Two inconsistent lines of FIAT awards emerged in relation to the interpretation of these clauses after the *SGS v Philippines* tribunal took a fundamentally different approach to the *SGS v Pakistan* interpretation of a similar umbrella clause. The discussion now turns to examine these two cases, as well as the cases that followed one or the other.

1. *SGS v Pakistan*

430. The tribunal in *SGS v Pakistan* was required to interpret the umbrella clause contained in the Switzerland-Pakistan BIT. This clause required that either of those States 'constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party'.⁸²⁰ In the tribunal's opinion, the clause did not transmute all claims arising out of contracts between an investor and a State to the level of international law claims for breach of

would 'make use of sources of international law insofar as that seems appropriate for the interpretation of the 1993 Law, such as "expropriation"'. *Tradex (Award)*, at paras. 69 and 135.

⁸¹⁸ See generally Gaillard, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the *SGS* Cases Considered', in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), at 325, and the literature cited at footnotes 1 and 2 therein.

⁸¹⁹ In *El Paso*, at para. 70, for example, the tribunal noted that Article II(2)(c) of the US-Argentina BIT constituted the broadest type of umbrella clause: 'Each Party shall observe any obligation it may have entered into with regard to investments'. See generally, the discussion in respect of umbrella clauses in *Noble Ventures (Award)*, at paras. 53-55. See also OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, Working Papers on International Investment, No. 2006/3, October 2006, at 3; and Schramke, 'The Interpretation of Umbrella Clauses in Bilateral Investment Treaties', *Transnational Dispute Management* (May 2007). For a detailed history of umbrella clauses, see Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', 20 *Arbitration International* 411 (2004). See also Annex III.

⁸²⁰ Article 11 of the Swiss-Pakistan BIT, quoted in *SGS v Pakistan*, at para. 53. The tribunal in *SGS v Pakistan (Jurisdiction)*, at para. 164, claimed that it was the first tribunal to interpret an umbrella clause. But see *Fedax (Merits)*, at para. 29; and *Eureko*, at para. 252.

the BIT. The three principal considerations that supported this conclusion. First, the tribunal examined the text of the relevant BIT provision:

As a matter of textuality therefore, the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion. The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically ‘elevated’ to the level of breaches of international treaty law.⁸²¹

431. Next, the tribunal considered the potential consequences of a finding that a contractual breach could be transformed by Article 11 into an international law violation:

the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence [that such was indeed the ‘shared intent’ of the Parties to the BIT] must be adduced by the Claimant.⁸²²

432. The specific consequences resulting from such a transformation were identified by the tribunal as follows: (1) the clause would incorporate by reference an unlimited number of State contracts and municipal law instruments containing commitments; (2) it would make the substantive rights in Articles 3 to 7 of the BIT superfluous;⁸²³ and (3) it would create an imbalance in contractual dispute settlement clauses between the investor and host State because the State could only proceed in the contractually stipulated forum with the consent of the investor whereas the investor would remain free to commence arbitration either under the contract or the BIT.⁸²⁴ In concluding, the tribunal took the view

⁸²¹ *SGS v Pakistan*, at para. 166.

⁸²² *SGS v Pakistan*, at para. 167.

⁸²³ According to the tribunal, ‘[t]here would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party’. *SGS v Pakistan*, at para. 168.

⁸²⁴ *SGS v Pakistan*, at para. 168.

that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.⁸²⁵

433. In arriving at its conclusion, the tribunal also interpreted Article 9 of the BIT at issue, which provided:

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within twelve months and if the investor concerned gives a written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States.⁸²⁶

434. In relation to the phrase ‘disputes with respect to investments’, the tribunal examined whether this referred to disputes in respect of contracts, BIT claims or both. In the opinion of the tribunal:

That phrase, however, while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.⁸²⁷

435. The tribunal’s interpretations of Articles 9 and 11 did not explicitly refer to the Vienna Convention Rules.⁸²⁸

⁸²⁵ *SGS v Pakistan*, at para. 171 (footnote omitted).

⁸²⁶ Quoted in *SGS v Pakistan*, at para. 80.

⁸²⁷ *SGS v Pakistan*, at para. 161 (original emphasis).

⁸²⁸ The tribunal did however indicate that ‘the object and purpose projected by [Article 11] and by the BIT as a whole’ constituted ‘familiar norms of customary international law on treaty interpretation’, which the tribunal said it applied. *SGS v Pakistan*, at para. 165.

436. After the award was issued, the Swiss government made known its disagreement with the tribunal's decision in a governmental note attached to a letter dated 1 October 2003 addressed to ICSID's Deputy-Secretary General. In the note, Switzerland—a non-disputing party in the case—stated that it was

alarmed about the very narrow interpretation given to the meaning of the [umbrella clause] by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions.⁸²⁹

2. Other Non-Elevation Cases

437. The *El Paso* tribunal cited large passages of *SGS v Pakistan* with approval. It did not accept that an umbrella clause could assimilate a breach of contract into a breach of a BIT. It stated that the consequence of holding otherwise would completely blur the division between the national legal order and the international legal order.⁸³⁰ The bottom line for the tribunal in *El Paso* appeared to be that 'it is necessary to distinguish the State as merchant from the State as sovereign'.⁸³¹ Its conclusion was that if an umbrella clause could transform any contract claim into a treaty claim

any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims. These far-reaching consequences of a broad interpretation of the so-called umbrella clauses [are] quite destructive of the distinction between national legal orders and the international legal order ...⁸³²

438. The *Salini v Jordan* tribunal declined to elevate a contract claim into a treaty claim on the basis of the specific nature of the umbrella clause at issue. In the relevant

⁸²⁹ Letter from Ambassador Marino Baldi, Swiss Secretariat for Economic Affairs, to the ICSID Deputy Secretary-General dated 1 October, 2003, attaching a Swiss government note entitled 'Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. versus Islamic Republic of Pakistan', 19(2) *Mealey's International Arbitration Reports* (Feb 2004), at pp. E-1 to E-2.

⁸³⁰ *El Paso*, at paras. 73 and 77.

⁸³¹ *El Paso*, at para. 79.

⁸³² *El Paso*, at para. 82.

investment treaty, the Italy-Jordan BIT, the parties agreed to ‘create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment’ in respect of ‘all undertakings’ it assumed in respect of foreign investors. To the tribunal, this obligation to create and maintain such a legal framework was less onerous than the common umbrella clause undertaking (e.g., to ‘observe’ any obligation a party assumed with respect to investors).⁸³³

439. In the Dissenting Opinion in *Eureko*, Arbitrator Rajski stated that an approach to umbrella clauses that elevated all contractual disputes usually within the purview of international commercial arbitration tribunals and State courts to the domain of BIT tribunals ‘created a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatizations of State owned companies’.⁸³⁴

3. *SGS v Philippines*

440. The umbrella clause at issue in *SGS v Philippines* is expressed in Article X(2) of the Swiss-Philippines BIT, which reads as follows:

Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.

441. Essentially, the tribunal’s interpretation of this clause placed heavy emphasis on the text, finding that it ‘means what it says’.⁸³⁵ Additionally, significant weight was given to the object and purpose of the Swiss-Philippines BIT:

[t]he BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other’. It is

⁸³³ *Salini v Jordan (Jurisdiction)*, at para. 126. See also the comparison of umbrella clauses in Annex III.

⁸³⁴ *Eureko*, Dissenting Opinion of Arbitrator Rajski, at para. 11.

⁸³⁵ *SGS v Philippines*, at para. 118. See also *ibid.* at paras. 114-115.

legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.⁸³⁶

442. On the basis of this twofold focus on the text and the object and purpose, the tribunal held that under the umbrella clause, the breach of contractual obligations could be elevated into BIT claims. It was not persuaded by the *Pakistan* award. Four core reasons underlined its position.

443. First, on a textual analysis, it did not agree that construing Article X(2) so as to include contractual obligations could be interpreted as ‘susceptible of almost indefinite expansion’ as suggested by *SGS v Pakistan*. Because Article X(2) was limited to ‘obligations ... assumed with regard to specific investments’, the *Philippines* tribunal believed this provision fell far short of elevating to the international plane all ‘municipal legislative or administrative or other unilateral measures of a Contracting Party’.⁸³⁷

444. Secondly, it considered that the *Pakistan* tribunal adopted a presumption against a broad interpretation of Article 11 on the basis of the international law principle that ‘a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law’. The *Philippines* tribunal’s criticism of this approach was that the question to be addressed was ‘essentially one of interpretation, and does not seem to be determined by any presumption’.⁸³⁸

445. Thirdly, it agreed with the concern as to the effect of a broad interpretation, inter alia, that dispute settlement clauses in contracts would be overridden.

⁸³⁶ *SGS v Philippines*, at para. 116.

⁸³⁷ *SGS v Philippines*, at para. 121. See also *Joy Mining*. The tribunal there indicated that not all contractual disputes would be transformed into investment disputes under the umbrella clause at issue. It took the view that only ‘a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection’ could transform the contractual claims at issue. *Joy Mining*, at para. 81 (emphasis added). The *El Paso* tribunal directed some strong criticism at the *SGS v Philippines* decision arguing that, if that award were followed, a State’s violation of any legal obligation (not simply contractual) would constitute a breach of the BIT. *El Paso*, at para. 76.

⁸³⁸ *SGS v Philippines*, at para. 122.

Nevertheless, it saw that a broad interpretation of Article X(2) would not necessarily create such wide-reaching consequences, i.e., ‘a full-scale internationalisation of domestic contracts’.⁸³⁹ It took the view that Article X(2)

does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.⁸⁴⁰

446. Fourthly, it concluded that the *Pakistan* award ‘failed to give any clear meaning to the “umbrella clause”’.⁸⁴¹ It considered that the *Pakistan* tribunal created jurisdictional uncertainty by concluding that the umbrella clause gave rise to ‘an implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favour of investors’ and that the tribunal did not ‘preclude the possibility that under exceptional circumstances’ an investor-State contract violation might constitute a treaty violation. As to the latter point, the *Philippines* tribunal considered that the concept of ‘exceptional circumstances’ was too fluid and vague to confer adequate certainty as to what cases qualified for elevation under this criterion.⁸⁴²

4. Other Elevation Cases

447. The majority in *Eureko* found the *SGS v Philippines* umbrella clause interpretation ‘cogent and convincing’.⁸⁴³ According to the majority, the plain or

⁸³⁹ *SGS v Philippines*, at para. 126.

⁸⁴⁰ *SGS v Philippines*, at para. 126 (original emphasis). Applying this to the facts before it, the tribunal considered that the basic obligation on the Philippines was the obligation to pay what was due under the contract in dispute ‘[b]ut this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract’. *Ibid.*, at para. 127. In other words, contracts determine the scope of a host States obligations, and BITs will be triggered if these obligations are not performed.

⁸⁴¹ *SGS v Philippines*, at para. 125.

⁸⁴² *SGS v Philippines*, at para. 125.

⁸⁴³ *Eureko*, at para. 257.

ordinary meaning of an umbrella clause that states that a party ‘shall observe’ obligations contained in it, was an ‘imperative and categorical’ prescription and that the reference to ‘any’ obligations was ‘capacious’. It added that ‘any’ obligations meant not only obligations of a certain type, but ‘any’—that is to say, all—obligations entered into with regard to investments of investors of the other Contracting Party.⁸⁴⁴ Further, it believed that the umbrella clause at issue could not be overlooked or equated with other substantive provisions. The clause must be interpreted to mean something itself. It by no means rendered the other BIT protections superfluous because those other protections were not normally covered in contracts.⁸⁴⁵

448. The other prominent case that considered it appropriate to elevate contractual obligations was *Noble Ventures*. There the tribunal interpreted the clause expressly referring to the Vienna Convention Rules and concluded that the umbrella clause in dispute was aimed at equating ‘contractual obligations governed by municipal law to international treaty obligations as established in the BIT’.⁸⁴⁶

5. Analysis

449. Annex III contains a tabular breakdown of various umbrella clauses referred to in FIAT awards. It is intended to assist the assessment and comparison of these clauses by systematically dissecting each into five elementary components. The table shows no fundamental difference between the umbrella clauses that were at issue in the *Pakistan* and *Philippines* cases. In effect, there is no substantial difference between guaranteeing a commitment (as in the case of the Swiss-Pakistan BIT) and observing an obligation (as in the Swiss-Philippines BITs). In contrast, the format it has adopted helps to demonstrate that the clause before the *Salini v Jordan* tribunal

⁸⁴⁴ *Eureko*, at para. 246.

⁸⁴⁵ *Eureko*, at paras. 249, 250 and 258.

⁸⁴⁶ *Noble Ventures (Award)*, at paras. 50 and 61.

may be viewed as distinguishable from most other umbrella clauses that appear in the table.⁸⁴⁷

450. Despite the textual similarities in the umbrella clauses at issue in the *Pakistan* and *Philippine* cases, the interpretations adopted by those two tribunals were patently different. The *SGS v Pakistan* tribunal emphasised that the umbrella clause before it was, on the face of the text, too broad, and if interpreted on this basis, the consequences would be unacceptably wide. A general conclusion could be made that the *Pakistan* determination hinged on the consequences of the interpretation rather than any ostensible application of the established rules of interpretation embodied in the Vienna Convention Rules.⁸⁴⁸ In contrast, the *SGS v Philippines* tribunal unmistakably paid more regard to the text of the clause and the object and purpose of the treaty.

451. On balance, the *Philippines* tribunal approach demonstrated a great deal more fidelity to the Vienna Convention Rules than the *Pakistan* tribunal. The *Philippines* decision is in line with the ILC emphasis on the text as the most important focus of the interpretative process. It also seems that the consequence of the *Philippines* interpretation was not dangerously unlimited but restricted to specific investments. Accordingly, the *Philippines* interpretation should not be taken as a precedent that elevates all disputed domestic measures carried out by the host State into treaty claims. Moreover, the *Philippines* tribunal was careful to maintain a distinction between contract and treaty claims, as was manifest in its refusal to assume jurisdiction over what it considered to be the contract-related component of the claim before it. That component (as to the precise amount due under the contract) was

⁸⁴⁷ See *Salini v Jordan (Jurisdiction)*, at para. 126 (noting that the umbrella clause at issue was ‘appreciably different’ from the umbrella clauses in *Philippines* and *Pakistan*).

⁸⁴⁸ One rationale behind the *Pakistan* award, but not articulated by the tribunal, may have been that it considered an interpretation that led to such wide consequences was inconsistent with a good faith interpretation required under Article 31(1) of the Vienna Convention. No mention whatsoever was given to the concept of good faith in any part of the award. Consequently, this theory must remain confined to the realms of conjecture.

required by the *Philippines* tribunal to be resolved first by the domestic court chosen by the parties.⁸⁴⁹

452. It may be concluded that from the perspective of treaty interpretation that the *SGS v Philippines* umbrella clause interpretation is to be preferred to the interpretation in *SGS v Pakistan*.⁸⁵⁰ The *Pakistan* tribunal's interpretation failed to give due consideration to the Vienna Convention Rules and relied too heavily on perceived consequences of the interpretation. By focusing on the potential consequences that may arise as a result of its interpretation, it appeared not to give full regard to the case before it—it was overly concerned with the effect of its decision on future cases rather than the disputed treaty text in the case it was mandated to decide. Given that no precedent exists in international arbitration (which is certainly evident in the *SGS v Philippines* decision) and that a tribunal's primary role is to determine the specific dispute before it, the *Pakistan* tribunal's concern for the implications of its decision was somewhat overemphasised and played an unwarranted role in supporting an excessively narrow interpretation of the umbrella clause in question. Even if the *Pakistan* tribunal made an interpretation that could be perceived as having a burdensome impact on a contracting party, that interpretation would not have bound later tribunals, which have full discretion to determine independently whether the specific circumstances before it fall within the meaning of the umbrella clause there at issue.

⁸⁴⁹ *Sempra Energy (Jurisdiction)*, at para. 126.

⁸⁵⁰ It should be added here that the concept of elevation adopted in *SGS v Philippines* is largely consonant with the opinion of F.A. Mann, who noted the following in relation to umbrella clauses in his study of British BITs:

it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or no [*sic*] such interference amounts to expropriation. The variation of the terms of a contract or licence by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of assets ... these and similar acts the treaties render unlawful.

Mann, 'British Treaties for the Promotion and Protection of Investments', 52 *BYBIL* 241 (1981), at 246.

453. In relation to the unlimited consequences that concerned the *SGS v Pakistan* tribunal, Schreuer has commented that

Problems could ... arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available ... For example, a small delay in a payment due to the investor and interest accruing from the delay would hardly justify arbitration under a BIT ... Equally a lease dispute with the host State that is peripheral to the investment will not be an appropriate basis for the institution of arbitral proceedings ... It is to be hoped that investors will invoke the umbrella clauses with appropriate restraint.⁸⁵¹

454. One strategy to allay the concerns of host-States that every trivial or minor investment dispute will be brought before an investment tribunal may be to focus on the part of the *Joy Mining* decision that referred to the following threshold: ‘a clear violation of the Treaty rights and obligations or a violation of contract rights of *such a magnitude as to trigger the Treaty protection*’.⁸⁵² This still leaves uncertainty as to what circumstances would satisfy the requisite magnitude of violation but it hints at something that is neither minor nor trivial. It may be an approach to be investigated to find a satisfactory balance between the *Pakistan* and *Philippines* approaches.

E. MOST FAVOURED NATIONS CLAUSES

455. A typical MFN clause is contained in Article 3(1) of the Italy-Jordan BIT, which reads:

Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less

⁸⁵¹ Schreuer, ‘Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road’, (2004) 5 *Journal of World Investment and Trade* at 255. In quoting Professor Schreuer, the *El Paso* tribunal, at para. 82, expressed scepticism at this call for self-discipline: ‘It is the firm conviction of this tribunal that the investors will not use appropriate restraint – and why should they? – if ICSID tribunals offer them unexpected remedies. The responsibility for showing appropriate restraint rests rather in the hands of the ICSID tribunals’.

⁸⁵² *Joy Mining*, at para. 81 (emphasis added). In this regard, see Rubins and Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner’s Guide* (2005), at p. 241.

favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.⁸⁵³

456. The generally accepted view is that this type of clause gives covered investors the benefit of more favourable substantive provisions contained in other treaties entered into by the host State—even if the investor’s own State is not a signatory to that other treaty. The interpretation of such MFN clauses becomes a controversial issue, however, when an investor asserts that an MFN clause in a BIT imports into that BIT the dispute settlement provisions of other treaties signed by the host State.⁸⁵⁴ The effect of such an argument is to replace the dispute resolution provisions in the BIT under which the claim is made by more generous dispute resolution provisions contained in other treaties.

457. FIAT approaches to this problem may be classified into two basic schools. The first, famously manifested in the *Maffezini* award, has considered that MFN clauses may incorporate dispute settlement provisions of other treaties. The second school, embodied in the decisions of *Salini v Jordan*, *Plama*, and *Telenor v Hungary*, does not consider that MFN clauses permit a BIT to incorporate dispute resolution provisions contained in other BITs of the host-State.

458. In *Maffezini*, the basic treaty containing the MFN clause (the Argentina-Spain BIT) did not state explicitly that it applied to dispute settlement clauses but the tribunal concluded that that MFN clause in fact embraced dispute settlement provisions of other treaties.⁸⁵⁵ As a consequence, the claimant was permitted to invoke the apparently more favourable dispute settlement mechanisms in the Chile-

⁸⁵³ This clause was subject to interpretation in *Salini v Jordan*.

⁸⁵⁴ See generally Kurtz, ‘The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: *Maffezini v Kingdom of Spain*’, in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), at 523; Fietta, ‘Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?’, [2005] *International Arbitration Law Review* 131; Teitelbaum, ‘Recent Developments in the Interpretation of Most Favoured Nations Clauses’, 22 *Journal of International Arbitration* 225 (2005); and Valentini, ‘The Most Favoured Nations Clause as a basis for Jurisdiction in Foreign Investor – Host State Arbitration’, 24 *Arbitration International* 447 (2008).

⁸⁵⁵ *Maffezini (Jurisdiction)*, at paras. 54-64.

Spain BIT. The interpretation was made without reference to the Vienna Convention Rules, despite explicit reference to these rules in a previous section.⁸⁵⁶ The wide words of the relevant MFN clause appeared to play a crucial role in the interpretation. They stipulated that MFN treatment would be afforded in respect of ‘all matters subject to this Agreement’.⁸⁵⁷ This all-encompassing expression was used by Spain only in the case of its BIT with Argentina. All other BITs entered into by Spain followed a narrower formulation.⁸⁵⁸ Teleological leanings are also suggested in the tribunal’s interpretation by its emphasis on the protection of investors.⁸⁵⁹

459. The MFN clause in *Siemens* was narrower than the *Maffezini*-type ‘all matters subject to this agreement’ clause. The *Siemens* MFN clause applied only to ‘treatment’ of investments. Nonetheless, the tribunal there considered that the MFN clause’s reference to ‘treatment’ and the phrase ‘activities related to the investments’ in the MFN clause in dispute were sufficiently wide to include settlement of disputes.⁸⁶⁰ As a result it followed the *Maffezini* approach and determined that the MFN clause before it applied to dispute settlement mechanisms.⁸⁶¹ No reference was made to the Vienna Convention Rules or its contents in the *Siemens* interpretation of the MFN clause.

460. The tribunal in *Gas Natural* also agreed with the decision in *Maffezini*. In its approach, it appeared to give consideration to both the text and the object and purpose of the BIT at issue:

⁸⁵⁶ See *Maffezini (Jurisdiction)*, at para. 27. The tribunal did, however, indicate there were limits to MFN clauses incorporating provisions of other treaties. See *Maffezini (Jurisdiction)*, at paras. 63-64.

⁸⁵⁷ See Article IV of the Argentina-Spain BIT, quoted in *Maffezini (Jurisdiction)*, at para. 38.

⁸⁵⁸ See *Maffezini (Jurisdiction)*, at para. 60.

⁸⁵⁹ See *Maffezini (Jurisdiction)*, at paras. 54-55.

⁸⁶⁰ *Siemens (Jurisdiction)*, at para. 103. Contrast Professor Brownlie’s Separate Opinion in *CME*. In taking the view that the MFN clause before him did not extend to the other treaty dispute provisions, he stated ‘[t]he presumption must be that the clause promises [MFN] treatment only in matters of treatment of an investment, and not to the process of dispute settlement’. *CME (Final Award)*, Separate Opinion, at para. 11.

⁸⁶¹ *Ibid.*

We remain persuaded that assurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.⁸⁶²

461. Some States have clearly made known their disagreement with the *Maffezini* approach. A note appended to the Free Trade Agreement of the Americas (FTAA) draft of 21 November 2003 indicates the reaction of certain States to *Maffezini*:

Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement:

The Parties note the recent decision of the arbitral tribunal in the *Maffezini* (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.⁸⁶³

462. In *Salini v Jordan*, Article 31(1) of the Italy-Jordan BIT (quoted above) was the subject of interpretation. The tribunal interpreted this clause to mean that the claimant did not possess a right to more favourable dispute settlement clauses contained in other treaties entered into by the host State. The following reasons formed part of its interpretation: (1) Article 3 of the BIT did not explicitly extend its application to dispute settlement provisions of that BIT, for example, it did not include a phrase indicating that it included 'all rights or matters covered by the agreement';⁸⁶⁴

⁸⁶² *Gas Natural (Jurisdiction)*, at para. 49. See also *National Grid (Jurisdiction)*, at paras. 79-94.

⁸⁶³ Quoted in *Plama (Jurisdiction)*, at para. 202. See also the footnote to Article 6 of the ASEAN Comprehensive Investment Agreement (2009), which states that its most favoured nations provision 'shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party'.

⁸⁶⁴ However, it could equally have been argued that it failed to indicate explicitly that the clause did not apply to the treaty's dispute settlement clauses. See, e.g., the *Plama* tribunal's discussion as to what

(2) the claimants did not establish that it was the common intention of the BIT parties to have the MFN clause apply to dispute settlement provisions; and (3) no practice of Jordan or Italy supported the claimant's contention.⁸⁶⁵ Reference was not made to the Vienna Convention Rules (although those provisions were referred to in a previous section of the award).

463. *Plama* offers a striking contrast to *Maffezini*, *Salini v Jordan* and *Siemens* in that it explicitly applied the Vienna Convention Rules in its interpretation of a MFN clause. The tribunal's ultimate view on the matter, firmly anchored to the textual approach, was articulated as follows:

an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.⁸⁶⁶

464. The interpretative approach adopted in that case, when compared to the interpretations adopted in *Maffezini*, *Salini* and *Siemens*, demonstrates the clarity and quality that can be added to an interpretation if the Vienna Convention Rules are used. The *Plama* tribunal's analysis, which included separate, insightful discussions on the ordinary meaning, the context and the object and purpose and Article 32 criteria, is an

may be considered as MFN clause's explicit exclusion of reference to dispute settlement provisions in other treaties. *Plama (Jurisdiction)*, at paras. 201-203.

⁸⁶⁵ *Salini v Jordan (Jurisdiction)*, at para. 118.

⁸⁶⁶ *Plama (Jurisdiction)*, at para. 223. Other relevant considerations of the tribunal in its interpretation were expressed as follows:

... the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. ...

...

... Doubt may be further created by the scope of the dispute settlement provisions in the other BITs. A number of them refer to disputes arising out of the particular BIT. It appears to be difficult to interpret the MFN clause as importing into the particular BIT such specific language from other BITs.

... Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.

Plama (Jurisdiction), at paras. 204-7 (footnote omitted).

exemplary display of the way in which the Vienna Convention Rules may be employed to render a clear, concise and structured interpretation of a treaty.⁸⁶⁷

F. DISCLOSURE OF PREPARATORY WORK

465. The various ways in which preparatory work can be used to interpret a treaty pursuant to Article 32 of the Vienna Convention have been discussed in Chapter V. A practical problem, however, is that an investor may have little or no access to preparatory work of the relevant investment treaty because the investor played no part in the negotiation of that treaty. In contrast, the respondent State is likely to possess relevant drafts or materials resulting from the negotiation and drafting process.⁸⁶⁸ This situation may give the respondent State an unfair advantage over the investor.⁸⁶⁹ The problems associated with the interpretative process in these asymmetric circumstances was encapsulated as follows by Sir Franklin Berman in his Dissenting Opinion in *Lucchetti (Annulment)*:

Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way round, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation ... That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with

⁸⁶⁷ *Plama (Jurisdiction)*, at paras. 189-197.

⁸⁶⁸ See, e.g., Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *SGS* Cases Considered', in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 325 (2005), at p. 342. See Schreuer, *supra* note 5, 618 *et seq.*; Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (1990), at 243; and Masood, 15 *Journal of the Indian Law Institute* 311 (1973), at 321.

⁸⁶⁹ See also *Lucchetti (Annulment)*, at paras. 69 and 79, in which the *ad hoc* Committee noted that having only one State party to the BIT in the proceedings before it made its task of interpreting that BIT more difficult.

a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up.⁸⁷⁰

466. Related issues of fairness and equality were pointed out in *Canfor (Order 5)*:

the Tribunal has borne in mind its duty to conduct the arbitral proceeding in a way consistent with the principles of fairness and equality among the disputing parties. ... the Tribunal notes that, in the context of investment disputes, each of the NAFTA Parties has accorded to the nationals of the other two Parties the right to submit to arbitration a claim on its own behalf regarding a dispute with that NAFTA Party. It is the Tribunal's view that, had the dispute arisen between any of the NAFTA Parties rather than between one of the NAFTA Parties and a private party, the parties to the arbitration would have had equal access to the negotiating history of the Agreement as well as equal opportunity to resort to those documents. In this context, the Tribunal finds it consistent with the principle of equality that the parties to this arbitration are given the same opportunity to present their case, including the opportunity for the private party to access existing documents of the types specified above which are freely available to the government party, irrespective of whether such documents are ultimately conclusive as to any issue in dispute.⁸⁷¹

467. Accordingly, the Tribunal invited the respondent to file 'any materials such as communications, explication notes, position papers or memoranda which were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA as identified in the Claimant's request for documents'.⁸⁷² This view was not shared by the *Methanex* tribunal:

The position in this arbitration may be contrasted with the parties' position in *Canfor v. The USA*. This Tribunal does not know the circumstances under Article 32 which may have moved the *Canfor* tribunal to decide as it did, but would in any event not subscribe to the international legal reasons given by the *Canfor* tribunal for its Order No. 5, at para. 22.⁸⁷³

468. From an investor's perspective, it is often futile to request the investor's home State to furnish the relevant preparatory work because that State is not a party to the arbitration and is generally reluctant to become involved in the dispute. In this regard, Wälde and Weiler have perceptively observed:

⁸⁷⁰ *Lucchetti (Annulment)*, Dissenting Opinion of Sir Franklin Berman, at para. 9.

⁸⁷¹ *Canfor (Order 5)*, at para. 22.

⁸⁷² *Canfor (Order 5)*, at para. 23.

⁸⁷³ *Methanex (Final Award)*, at Part II, Chpt. H, para. 20, n. 14, and, similarly, at Part II, Chpt. H, para. 25, n. 18.

Rarely, the interests of the investor in solving his problem coincided with those of the home state. The home state's foreign affairs agencies were not interested in having their inter-state relationship affected by private companies. Even if they took up such cases, their strategy and legal argument were influenced by much wider ranging considerations
...⁸⁷⁴

469. The inequality of access to preparatory materials may thus become a serious issue in the event the interpretation may depend on or be influenced to some degree by the preparatory work.

470. The types of potentially relevant documents to which claimants have no access (without the co-operation of one of the State parties to the treaty at issue) may be gleaned from the document requests made by FIATs to States. These have included production requests for the following:⁸⁷⁵

- a) 'the draft texts of the Agreement as compiled and distributed by Canada [to Mexico and the United States] during the course of the negotiations';⁸⁷⁶
- b) 'any materials such as communications, explication notes, position papers or memoranda which, to the extent they exist, were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA';⁸⁷⁷

⁸⁷⁴ Wälde and Weiler, *supra* note 62, at 160-61. These divergent interests are also reflected in the general lack of support that home States provide to its investors under NAFTA Article 1128, under which non-disputing NAFTA States may make submissions to a NAFTA tribunal on the interpretation of NAFTA.

⁸⁷⁵ For an example of a non-FIAT international law decision in which the preparatory work was requested see *Kingdom of Greece (on behalf of Apostolidis) v. Federal Republic of Germany*, Arbitral Commission on Property, Rights and Interests in Germany, 34 ILR 219 (1960), at 242 *et seq.*

⁸⁷⁶ *Canfor (Order 4)*, at para. 9. The tribunal affirmed this decision in *Canfor (Order 5)*, at para. 18, stating that this category of materials 'unquestionably form part of the negotiating history of the NAFTA which may be considered for the purposes of treaty interpretation'.

⁸⁷⁷ *Canfor (Order 5)*, at para. 21. In the previous paragraph the tribunal noted:

To the extent they exist, negotiating records such as communications, explication notes, position papers or memoranda established during the negotiation of the Agreement and which were circulated among, discussed by or relied upon by the negotiating teams or by the drafting teams of the NAFTA Parties may well be pertinent to the issue of the common intention of the NAFTA Parties in suggesting a particular draft and in adopting, or rejecting, a particular provision.

Ibid., at para. 20.

- c) the ‘record of discussions leading up to agreement upon the final text of Article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters’;⁸⁷⁸
- d) ‘such evidence as is available as to the interpretation and practice that the Kingdom of The Netherlands and the Republic of Bolivia have placed on the relevant portions of the [BIT]’;⁸⁷⁹ and
- e) ‘any potentially relevant negotiating history, if available’.⁸⁸⁰

471. In this context, the *Pope & Talbot* tribunal requested Canada, and through it, the other NAFTA parties, whether preparatory work existed to support a certain interpretation of the NAFTA or otherwise shed light on the matter, and, additionally, whether the FTC was presented with any material related to the interpretation, including any negotiation history.⁸⁸¹

472. A unique situation involving a FIAT request to a government for information arose in *Aguas del Tunari*. There, the Tribunal acted under Rule 34 of the ICSID Arbitration Rules to request information from The Netherlands as to the interpretation of the Netherlands-Bolivia BIT. Although The Netherlands was not a party to the arbitration, questions raised in the Dutch Parliament led a Dutch minister to indicate on 18 April 2002 that the Netherlands-Bolivia BIT was not applicable in the *Aguas del Tunari* case.⁸⁸²

473. Because Bolivia placed significant weight on this statement, the tribunal decided that further information from The Netherlands could assist the tribunal in its work. President of the tribunal therefore wrote to the Legal Adviser of the Dutch Ministry of Foreign Affairs stating that, inter alia, (1) The Netherlands under Article

⁸⁷⁸ *Pope & Talbot (Damages)*, at para. 37.

⁸⁷⁹ *Aguas del Tunari*, at para. 268, quoting Order No. 1. While the breadth of this request is considerably wide, the tribunal appears to have expected it to have produced materials pertaining to that BIT’s negotiation history. See *Aguas del Tunari*, at para. 269.

⁸⁸⁰ *Grand River (Jurisdiction)*, at para. 35.

⁸⁸¹ *Pope & Talbot (Damages)*, at para. 28.

⁸⁸² *Aguas del Tunari*, at para. 255.

27 of the ICSID Convention was under an obligation not to provide diplomatic protection to its nationals in the case of investment disputes covered by the tribunal, (2) the tribunal did not seek the view of The Netherlands as to the jurisdiction of the tribunal but the specific documentary bases on which the government provided the responses to the parliamentary questions, (3) the information of The Netherlands government—although not a party to the dispute—would assist the work of the tribunal, (4) the tribunal ‘aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case’, and (5) if the reply of 18 April 2002

reflects an interpretative position of general application held by the Government of the Netherlands, the Tribunal requests that the Government provide the Tribunal with information (of a type suggested by Articles 31 and 32 of the Vienna Convention on the Law of Treaties as being possibly relevant) upon which that general interpretative position was based.⁸⁸³

474. The Dutch Legal Adviser responded to the request by submitting a document entitled ‘Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia’. This represents a rare FIAT case in which a non-disputing State to a BIT has furnished information to an investment tribunal regarding the interpretation of that BIT.

475. Just as requests for the production of preparatory materials have been granted by tribunals, FIAT case law equally demonstrates that tribunals may also deny such requests. The following grounds have been used as justifications for denying requests for production of preparatory work:

- a) the materials requested did not reflect the common intentions of the parties;⁸⁸⁴

⁸⁸³ Letter by the President of the Tribunal, David D. Caron, of 1 October 2004 to the Legal Adviser of the Dutch Ministry of Foreign Affairs, J.G. Lammers. Appendix IV to the Decision on Jurisdiction.

⁸⁸⁴ *Canfor (Order 5)*, at para. 19 (noting that memoranda, notes and communications reflecting the internal deliberations of a NAFTA Party ‘established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision’). See also *Methanex (Final Award)*, at Part II, Chpt. H, para. 25 (finding that the claimant did not demonstrate that the intentions of

- b) there had been an unreasonable delay in making the request;⁸⁸⁵
- c) no satisfactory explanation had been provided as to why an Article 31 interpretation would be confirmed by the requested materials or may have led to a result stipulated in Article 32(a) and (b);⁸⁸⁶
- d) the disclosure sought was not relevant or material to the issues sought to be proved as required by Article 3.6 and 9.2(a) of the IBA Rules on the Taking of Evidence;⁸⁸⁷
- e) the scope of the request was exceptionally broad;⁸⁸⁸ and
- f) the documentation had neither been seen nor discussed by all the State parties to the treaty.⁸⁸⁹

476. In this regard, the *Methanex* tribunal also indicated that where there existed a series of international tribunal decisions on a given provision or there had been an interpretation by the treaty parties, the reasons for recourse to supplementary means would decline.⁸⁹⁰

477. Even if a tribunal grants a request for the production of preparatory materials, this still does not guarantee these materials will be produced. The *Pope & Talbot* case provides a controversial example of the potential difficulties that private parties and also tribunals may encounter in obtaining preparatory work from States. A high point of dispute in that case was the interpretation of NAFTA Article 1105. Pope & Talbot requested from Canada's Coordinator for Access to Information and Privacy several NAFTA documents including minutes and records of negotiating meetings and agreed negotiating texts. In 1997, the Coordinator wrote to the claimant stating:

the NAFTA parties 'could reliably be established from documents which had never been seen or discussed between the three NAFTA parties').

⁸⁸⁵ *Methanex (Final Award)*, at Part II, Chpt. H, paras. 17-18.

⁸⁸⁶ *Methanex (Final Award)*, at Part II, Chpt. H, para. 19.

⁸⁸⁷ *Methanex (Final Award)*, at Part II, Chpt. H, para. 20.

⁸⁸⁸ *Methanex (Final Award)*, at Part II, Chpt. H, para. 25.

⁸⁸⁹ *Methanex (Final Award)*, at Part II, Chpt. H, para. 25. The tribunal noted that in the circumstances at hand, even though Methanex did not have sight of the preparatory work, it did not see this to present a difficulty in providing such explanations.

⁸⁹⁰ *Methanex (Final Award)*, at Part II, Chpt. H, para. 24.

[T]his will confirm that, apart from the actual NAFTA Agreement which is in the public domain, there are no minutes or records of NAFTA negotiating minutes, nor any mutually agreed negotiating texts, which have been or can be released publicly.⁸⁹¹

478. In November 2000, at an early stage of the *Pope & Talbot* proceedings, the tribunal asked Canada whether any preparatory work existed that might shed light on the matter. In response, counsel for Canada informed the tribunal:

Let me make it easy for everybody. I have been in three or four of these cases, so I happen to know if there are travaux préparatoires, and can tell you that I have not been able to find any.⁸⁹²

479. Again, the tribunal addressed the same question to Canada in September 2001, which produced the same result.⁸⁹³ At the closing stages of the hearing on the merits in November 2001, counsel for Pope & Talbot produced a submission filed by Methanex Corporation in its NAFTA Chapter 11 arbitration against the United States. In that submission, it was asserted that one of the principal Chapter 11 negotiators for Mexico recalled that various versions of Article 1105 were circulated and discussed among the negotiators and later in those proceedings that Mexican negotiator provided a statement declaring that the drafts would be found in the ‘negotiating history’ maintained by the NAFTA parties or in the ‘archives’ of the United States or Canada.⁸⁹⁴ In the *Methanex* case, the United States submitted that the Mexican negotiator’s recollection was

unsupported by any of the *travaux* that Mexico or counsel for the United States could locate after a diligent search. Moreover, ... *travaux* such as those that do exist for the NAFTA ‘must be used with caution ... on account of their fragmentary nature’.⁸⁹⁵

480. In the *Methanex* proceedings, Mexico also challenged the negotiator’s recollection after it conducted a ‘search of its records of the negotiations’.⁸⁹⁶ The next

⁸⁹¹ Quoted in *Pope & Talbot (Damages)*, at para. 31.

⁸⁹² Quoted in *Pope & Talbot (Damages)*, at para. 40. See also, *ibid.*, at para. 28.

⁸⁹³ *Pope & Talbot (Damages)*, at para. 28.

⁸⁹⁴ *Pope & Talbot (Damages)*, at paras. 34-35.

⁸⁹⁵ Rejoinder of the United States of 17 December 2001 to Methanex’s Reply Submission in the *Methanex* case, quoted in *Pope & Talbot (Damages)*, at para. 35.

pertinent event in *Pope & Talbot* was a February 2002 letter by the claimant's counsel informing the tribunal that, contrary to Canada's previous position taken in *Pope & Talbot*, the NAFTA parties admitted to the existence of *travaux* in separate proceedings instituted under NAFTA Chapter 20.⁸⁹⁷ Based on this knowledge, the *Pope & Talbot* tribunal requested Canada to produce a 'record of discussions leading up to agreement upon the final text of Article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters'.⁸⁹⁸ In compliance with this request, Canada submitted in April 2002 approximately 1,500 pages of documents, indicating that over 40 different drafts of Article 1105 had been made before the final version had been agreed!⁸⁹⁹ The tribunal made known its displeasure with this staggering revelation in the following terms:

the Tribunal knows that having the documents would have made its earlier interpretations of Article 1105 less difficult and more focused on the issues before it. In this sense, the failure of Canada to provide the documents when requested in November 2000 was unfortunate. Forcing the Tribunal to chase after the documents as it did is not acceptable.

...

... Canada has not told the Tribunal where the documents resided, or how a diligent search would have failed to find over forty iterations of Chapter 11. The documents themselves show that Canada possessed them at one time. It is not credible that negotiators would have forgotten their existence. Surely the other NAFTA Parties would have been willing to refresh recollections and provide copies. If Canada did not want to release them, it surely knew how not to do so, as the very letter transmitting the documents to the Tribunal included a refusal to provide other documents. Finally, it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exists, yet no effort was made by Canada to let the Tribunal know what, if anything, has been withheld.

... This incident's injury to the Tribunal's work can now be remedied. But the injury to the Chapter 11 process will surely linger.⁹⁰⁰

⁸⁹⁶ Mexico's letter to the *Methanex* tribunal of 11 February 2004, quoted in *Pope & Talbot (Damages)*, at para. 35.

⁸⁹⁷ *Pope & Talbot (Damages)*, at para. 36, quoting *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, Final Report of Chapter 20 Panel, 2 December 1996, at para. 71 ('Canada also relies on the text of the NAFTA more broadly, on the *travaux préparatoires* [sic.] of the NAFTA, on various other statements and documents said to indicate the intention of the Parties in the period of negotiations'); and *In the Matter of Cross-Border Trucking Services*, Final Report of Chapter 20 Panel, 6 February 2001, at para. 212 ('[e]specially, given the negotiating history of NAFTA, which shows that the Parties agreed').

⁸⁹⁸ *Pope & Talbot (Damages)*, at para. 37.

⁸⁹⁹ *Pope & Talbot (Damages)*, at para. 38.

⁹⁰⁰ *Pope & Talbot (Damages)*, at paras. 39 and 41-42.

481. The problems associated with investor access to the preparatory work of the NAFTA were reduced on 16 July 2004 when the FTC announced that it would release to the public the negotiating history of Chapter 11 of the NAFTA. The FTC statement noted that

We are committed to transparency in trade negotiations. The negotiating texts of the NAFTA are documents of historical value and we recognize the level of public interest in them. We asked our officials to compile the NAFTA negotiating texts, bearing in mind the time necessary to complete this. We began the process with Chapter 11 and are pleased to announce that Chapter 11 texts will be available through our websites ...⁹⁰¹

482. Despite this change in approach, doubts still linger as to whether all relevant NAFTA negotiation documentation has been released.⁹⁰²

483. In lieu of negotiating texts, evidence by governmental officials involved in a treaty's negotiations may be of assistance. However, FIATs have been cautious in ascribing significant weight to such evidence. In *Tza Yap Shum*, for example, evidence by negotiators for both State parties of the BIT at issue were presented by the respondent but the tribunal did not regard this evidence as convincing.⁹⁰³ In *SwemBalt*, a Swedish Foreign Ministry official having experience in investment treaty negotiation testified for the Swedish claimant in that case but the tribunal did not mention whether this assisted their decision.⁹⁰⁴ Additionally, such evidence raises the possibility that a contrary opinion from a negotiator of the other State party may be submitted by the opposing side effectively to neutralize the first opinion.⁹⁰⁵ Other helpful material that may be more readily available to investors may be explanations

⁹⁰¹ Quoted in *Methanex (Final Award)*, Part II, Chpt. H, para. 2, n. 2. The negotiating history is available at http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp.

⁹⁰² Numerous negotiating texts of the NAFTA are available at www.naftaclaims.com, which states '[t]he following versions of the NAFTA negotiating texts were finally made public by the three NAFTA governments in July 2004, after years of denying that they even existed, followed by a few more years of simply denying access. Two tribunals have already issued orders suggesting that more documents exist which could add to our understanding of the negotiations ...' (accessed 29 January 2009).

⁹⁰³ See, e.g., *Tza Yap Shum*, at para. 212. See also paras. 166-171 of that case.

⁹⁰⁴ *SwemBalt*, at para. 14.

⁹⁰⁵ See *Eureko*, at para. 185, n. 17.

given by signatory governments to its legislature in the course of the approval of a treaty or from a minister's parliamentary statements.⁹⁰⁶

484. To remedy the potential imbalance in access to preparatory work assistance may be drawn from the multilateral treaty context. If a dispute arises in respect of a multilateral treaty between one State that participated in its negotiation and another (which subsequently acceded to the treaty) that did not, Sinclair has remarked

that recourse to *travaux préparatoires* does not depend on the participation in the drafting of the text of the State against whom the *travaux* are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States that participated in the *travaux préparatoires* and the other for States who did not participate. One qualification should, however, be made. The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. Travaux préparatoires which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States.⁹⁰⁷

485. Such an approach may be useful in the foreign investment arbitration context. This rule could be adapted to investment treaty disputes and invoked to warn respondent States that they may not be able to invoke preparatory work in their favour unless all of it is disclosed to the claimant. An obstacle to this approach is that it may be difficult to know whether all the preparatory work has indeed been disclosed, as the *Pope & Talbot* experience demonstrated.

486. One of the protections the Vienna Convention Rules offer an investor is that preparatory work is not utilised in the primary Article 31 interpretative analysis. Preparatory work is only to be used in the circumstances stipulated in Article 32. By

⁹⁰⁶ See, e.g., *Mondev*, at para. 111-112; and *Aguas del Tunari*, at para. 261 (in this latter case, however, it was held that the government answers given to a series of Dutch parliamentary questions may not have been correct).

⁹⁰⁷ Sinclair, *supra* note 6, at p. 144 (emphasis added). See also Yasseen, *supra* note 194, at 89-90. In the domestic context, this concern was raised by Lord Fraser in *Fothergill v Monarch Lines*. In that case, in having to interpret the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention 1929), he declined to take judicial notice of minutes of the 1955 Hague Conference that amended that Convention 'because it has not been sufficiently published to persons whose rights would be affected by it', [1981] AC 251, at 287. He maintained this position even though he acknowledged that those minutes had been published and were available for purchase at Her Majesty's Stationery Office on the basis that 'they have never been reasonably accessible to private citizens, or even to lawyers who do not specialise in air transport law'. *Ibid.*, at 288.

regulating the use of preparatory work to the Article 32 supplementary means of interpretation, the Vienna Convention Rules provide some degree of protection to investors that do not have access to preparatory work.⁹⁰⁸

487. In contrast to the document request episodes relating to the NAFTA and BIT preparatory work, there has been an absence of disputes concerning the disclosure of preparatory work of the ICSID Convention. This is attributable to the detailed four volume collection published by ICSID on the negotiating history of the ICSID Convention.⁹⁰⁹ In addition to this valuable publication, there are other public sources that also cast some useful light on the ICSID Convention preparatory work. These include the Executive Directors' Report and the published writings of Aaron Broches, who was involved with most of the Convention's preparatory work. Consequently much of the preparatory work is already in the public domain and readily available to claimants.

G. PRO-INVESTOR BIAS IN INTERPRETING INVESTMENT TREATIES?

488. Interpretations giving significant weight to the object and purpose of investment treaties have been criticised as favouring investors to the detriment of host States. Concerns as to this pro-investor bias arose from the *SGS v Philippines* tribunal view (referring to the Philippines-Switzerland BIT) that '[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments'.⁹¹⁰ In this regard, Zachary Douglas has taken the following view:

⁹⁰⁸ This point resulted from discussions with Professor Michael Reisman during his 'Selected Problems in International Investment Law' seminars at the School of Law, City University of Hong Kong, 2009.

⁹⁰⁹ See *supra* note 40.

⁹¹⁰ *SGS v Philippines*, at para. 116. See also *Renta 4*, at para. 57 ('[t]o "favour the protection of covered investments" is not equivalent to a presumption that the investor is right'); and *MTD (Award)*, at para. 104. In relation to the interpretation of a domestic law conferring ICSID jurisdiction, the tribunal in *Tradex (Jurisdiction)*, 5 ICSID Reports 43, at 68, observed that Albania had confirmed to the tribunal of its commitment to the full protection of foreign investment. The tribunal added that because of this, it would 'seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the [1993 Albanian Investment Law] should rather

The promotion of foreign investment is one of the key policies underlying the conclusion of investment treaties by states. So much is clear from their preambles. But this policy cannot be invoked to determine the rights and obligations of the parties to a *particular* investment dispute on the merits. If this policy is relied upon to decide the import of a treaty provision to the particular controversy between the parties, then the implication is that the investor must prevail for this policy objective of the treaty to be upheld. An interpretive approach that systematically favours the interests of one of the disputing parties need only be articulated to be proven unsound. Can reference to the policy of promoting foreign investment ever result in an interpretation favourable to the state party's defence? If the answer to that question is no, both as a matter of experience (based on the record of past decisions) and as a matter of logic, then something is wrong with the interpretative approach and the idea that it is supported by Article 31 of the Vienna Convention of the Law of Treaties is untenable.⁹¹¹

489. Adding to these concerns is Susan Franck's suggestion that an overly exuberant use of the object and purpose will distance the interpretation from an objective analysis of a treaty's text and promote an interpretation based on the subjective whims of the interpreter.⁹¹²

490. Certain FIATs have given particular thought to this pro-investor bias issue. The *Noble Ventures* tribunal, conscious of its dangers, stated that 'it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors'.⁹¹³ In *Plama*, the claimant placed much reliance on the object and purpose of the BIT in question (the preamble of the BIT in question stated that its object and purpose was 'the creation of favourable conditions for investments by investors'). In response, the tribunal drew attention to the limits of a treaty's object and purpose in determining what the parties intended a particular provision to mean. Referring to the particular facts of that case, the tribunal took the view that broad statements in the BIT

be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular.' See also *Loewen (Jurisdiction)*, at paras. 50-53.

⁹¹¹ Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex', 22 *Arbitration International* 27 at 50 (2006).

⁹¹² See Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Review* 1521 (2004), at 1578 (an interpretation focused on the object and purpose of a treaty 'is subject to more subjective interpretation once analysis becomes more divorced from text').

⁹¹³ *Noble Ventures (Award)*, at para. 52. See also the judgment of the English High Court in *Czech Republic v European Media Ventures SA*, [2007] EWHC 2851 (Comm), at para. 23 ('If the suggestion made in *Ecuador v. Occidental (No.2)* at §28, that it is permissible to resolve uncertainties in the interpretation of a BIT in favour of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law.').

as to the purpose of investment treaties were ‘undeniable in their generality’ but were ‘legally insufficient’ to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended its MFN provision to cover agreements to arbitrate in other treaties to which Bulgaria or Cyprus was a Contracting Party’.⁹¹⁴ It thereafter cited Sinclair’s warning of the

risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.⁹¹⁵

491. Also instructional is the position adopted in *ADF v United States* in relation to the interpretation of the NAFTA:

NAFTA’s objectives, together with the statements set out in the Preamble of NAFTA, are necessarily cast in terms of a high level of generality and abstraction. In contrast, interpretive issues commonly arise in respect of detailed provisions embedded in the extraordinarily complex architecture of the treaty. ... We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*. The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter.⁹¹⁶

492. The answer to the pro-investor bias concerns may lie in a middle-ground approach taking account of both the host State and the investor, as was provided in *El Paso*:

The Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.⁹¹⁷

⁹¹⁴ *Plama (Jurisdiction)*, at para. 193.

⁹¹⁵ *Plama (Jurisdiction)*, at para. 193, citing Sinclair, *supra* note 6, at 130.

⁹¹⁶ *ADF (Award)*, at para. 147.

⁹¹⁷ *El Paso*, at para. 70. See also *Klöckner (Annulment)*, at para. 3 (‘application of [Article 52(1) of the ICSID Convention] demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention) and para. 119 (interpreting Article 52(1)(e) of the ICSID Convention, the tribunal adopted ‘neither a narrow interpretation nor a broad interpretation, but bears in mind the customary principles of treaty interpretation and, in particular, the objective of the

493. Other tribunals have espoused similar views. The *Amco* tribunal considered that the ICSID Convention ‘is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.’⁹¹⁸ In *Saluka*, the tribunal observed that ‘an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.’⁹¹⁹ In theory, this middle-ground approach is sound but the delicate balancing exercise it requires will be a difficult one to implement to the satisfaction of both investor and host State.

494. In a few cases, the object and purpose criterion has been invoked to assist the host State to the detriment of the investor. *Banro* is a case on point. One of the reasons the tribunal there declined to accept jurisdiction over the investor’s claim was due to the object and purpose of the ICSID Convention, which it considered was to remove disputes between the host States and investors from the realm of diplomacy and place them with the ICSID Convention’s dispute settlement mechanism. It stated

since the ICSID Convention has as its purpose and aim to protect the host State from diplomatic intervention on the part of the national State of the investor and to ‘depoliticize’ investment relations, it would go against this aim and purpose to expose the host State to, at the same time, both diplomatic pressure and an arbitration claim.⁹²⁰

495. On this basis it considered that the investor was precluded from pursuing its claim by way of diplomatic intervention by Canada as well as invoking the United

Convention and of the system it establishes’); *Amco (Award)*, at para. 249 (indicating that the ICSID Convention was concluded to address the need for international cooperation for economic development and the role of international investment therein by ‘protecting host States as well as foreign investors’ and that ‘[t]o deny the host State’s liability where the same infringes the obligations undertaken towards the investor – as well as to refuse, in other instances, the investor’s liability where he infringes his own obligations – would move to empty the ICSID Convention of any meaning’); *Amco (Jurisdiction)*, at para. 23 (‘to protect investments is to protect the general interest of development and of developing countries’); and *Methanex (Partial Award)*, at para. 105.

⁹¹⁸ *Amco (Jurisdiction)*, at para. 23. On this point, see generally García-Bolivar, ‘The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements’, 6(5) *Journal of World Investment and Trade* 751 (2005).

⁹¹⁹ *Saluka (Award)*, at para. 299.

⁹²⁰ *Banro*, at para. 19.

States nationality of one of its subsidiaries to file an ICSID claim. Because both of these avenues had in fact been availed, this was considered contrary to the ICSID Convention's object and purpose. Accordingly, the tribunal dismissed Banro's ICSID claim for lack of jurisdiction.⁹²¹

496. A further example of reliance on the object and purpose in a manner that did not favour investors is found in Prosper Weil's Dissenting Opinion in *Tokios*. He there gave a high degree of importance to the object and purpose of the ICSID Convention in determining that a Lithuanian corporation owned by Ukrainians (99 per cent of its shares were held by Ukrainian nationals) could not institute an ICSID claim against the Ukraine. In so concluding he observed:

It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the international investment that the Convention governs, that is to say, an investment implying a transborder flux of capital. ... The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose.⁹²²

H. LIBERAL AND RESTRICTIVE INTERPRETATION

497. Simply put, a restrictive interpretation strives to narrow the scope of a treaty provision and a liberal interpretation works to broaden the scope of a provision. The restrictive approach is particularly relevant for investment treaty arbitration because it is often invoked by States to argue—on grounds of protecting State sovereignty—that treaty provisions granting jurisdiction to international tribunals rather than to national courts should be construed narrowly.⁹²³ For example, States that adopt this position argue that where there is any ambiguity in jurisdictional clauses, a restrictive

⁹²¹ *Banro*, at paras. 19, 20 and 26.

⁹²² *Tokios (Opinion)*, at para. 19. See also *ibid.*, at paras. 6 and 24-7; and the *Loewen (Award)*, at paras. 223, 225, 233 and 237, in which it could be said that the object and purpose of the NAFTA worked against the investor.

⁹²³ See *Oppenheim*, *supra* note 4, at 1276, n. 7.

interpretation should be made to favour maintaining the jurisdiction of local courts over international tribunals.⁹²⁴

498. A profitable synthesis of the current international law position relating to this argument was provided in *Mondev*. There, the tribunal stated that '[n]either the International Court of Justice nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction'.⁹²⁵ The proper method of interpretation, according to the *Mondev* tribunal, was to ask 'what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties', which it stated were Articles 31-33 of the Vienna Convention.⁹²⁶

⁹²⁴ See, e.g., the argument of the US in *Methanex (Partial Award)*, at para. 103.

⁹²⁵ *Mondev*, at para. 43, n. 4, citing *Fisheries Jurisdiction Case (Spain v. Canada)*, ICJ Reports 1998 p. 432 at pp. 451-2 (paras. 37-38), 452-456 (paras. 44-56). See also *Amco (Jurisdiction)*, (1983) 1 ICSID Reports 389, at 394 and 397; *Ethyl (Jurisdiction)*, decision of 24 June 1998, (1999) 38 ILM 708, at 723 (para. 55); *SOABI (Award)*, at para. 4.09; *Methanex (Partial Award)*, at paras. 103-105; *Casado (Provisional Measures)*, at para. 18 (concerning provisional measures and the interpretation of Article 47 of the ICSID Convention); *Eureko*, at paras. 186 and 258; *Loewen (Jurisdiction)*, at paras. 50-51; *Tokios (Jurisdiction)*, at para. 68; and *Metalpar (Jurisdiction)*, at para. 92. See also, Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 168 ('where jurisdiction is clearly excluded that fact should be recognized, in other cases a restrictive interpretation which would result in the ouster of jurisdiction should not be adopted where a reasonable approach could bring about the opposite result'); Schreuer, 'The Interpretation of Treaties by Domestic Courts', 45 *BYBIL* 255 (1971), at 283-301; and Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *BYBIL* 48 (1949), at 65 and 71. For a rejection of the restrictive approach to interpreting arbitration agreements entered directly between investors and States, see *Duke v Ecuador*, at para. 128 *et seq.* Concerning ICJ decisions, see *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, 39 ILM 1116 (2000) at p. 1130 (para. 42). It should be noted that the pronouncements of the ICJ in the *Fisheries Jurisdiction* case and the *Aerial Incident* case concerned the interpretation of declarations, not treaties. In Judge Higgins' Separate Opinion in the *Oil Platforms* case, *Jurisdiction*, ICJ Reports (1996), at 857, para. 35, she observed '[i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses'. This passage was quoted with approval in *Methanex (Partial Award)*, at para. 105. As to early cases adopting a restrictive interpretation of clauses concerning a State's obligations, see *Frontier between Turkey and Iraq*, Advisory Opinion, (1925) Series B. No. 12, p. 25. This does not mean to say that cases during that time did not also adopt liberal or broad interpretations. See, e.g., *Nielson v Johnson* (1929), 279 US 47, 5 Annual Digest (1929-30), at 302; and generally *Oppenheim*, *supra* note 4, at 1276, n. 7.

⁹²⁶ *Mondev*, at para. 43. This view is consistent with the general consensus in international law. See, e.g., Judge Brower, in his Concurring Opinion in *Iran v United States*, Award of 13 May 1985, 8 Iran-US CTR 189 (1989), at 207 stated that '[t]he Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed'. See also *Siemens (Jurisdiction)*, at para. 81 ('the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.').

Likewise, the *Siemens* tribunal considered that ‘the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention’.⁹²⁷ A similar view was expressed by the *Aguas del Tunari* tribunal when it noted that the Vienna Convention Rules have moved away from ‘the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action’.⁹²⁸ It added that the Vienna Convention failed to mention this cannon specifically.⁹²⁹

499. In *Mondev*, the United States argued that ‘its consent to arbitration was given only subject to the conditions set out in NAFTA, which conditions should be strictly and narrowly construed’.⁹³⁰ The tribunal’s response was that ‘there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties’.⁹³¹

500. With respect to interpreting the annulment grounds stipulated in Article 52(1) of the ICSID Convention, the *ad hoc* Committee in *MINE* said this:

... The fact that annulment is a limited, and in that sense extraordinary, remedy might suggest either that the terms of Article 52(1), i.e., the grounds for annulment, should be strictly construed or, on the contrary, that they should be given a liberal interpretation since they

⁹²⁷ *Siemens (Jurisdiction)*, at para. 81.

⁹²⁸ *Aguas del Tunari*, at para. 91. See also *Ethyl (Jurisdiction)*, at para. 55 (‘[t]he erstwhile notion that “in case of doubt a limitation of sovereignty must be construed restrictively” has long since been displaced by Articles 31 and 32 of the Vienna Convention’), citing *Free Zones of Upper Savoy and the District of Gex*, PCIJ, Ser. A/B, No. 46, at 167.

⁹²⁹ *Aguas del Tunari*, at para. 91.

⁹³⁰ *Mondev*, at para. 42 (the quote is the tribunal’s summary of the US submission).

⁹³¹ *Mondev*, at para. 43. See also *Tza Yap Shum*, at para. 37. But see *Mondev* at para. 91, where the tribunal held that NAFTA should be interpreted broadly to cover investments which may not subsist under the identity of the claimant (there the investment—real estate—was lost through foreclosure) at the time the arbitration is commenced. In assessing the law of a State that consents to ICSID jurisdiction, the *SPP* tribunal observed that ‘jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant’. *SPP (Jurisdiction-1988)*, at para. 63. Similarly, in response to a claim that an investor-State agreement to arbitrate existed, *Amco (Jurisdiction)*, at para. 16 looked neither to a restrictive nor liberal interpretation but at ‘the normal expectations of the parties, as they may be established in view of the agreement as a whole, and of the aim and the spirit of the Washington Convention as well as of the Indonesian legislation and behaviour’. *Amco (Jurisdiction)*, at paras. 14(i) and 16-18.

represent the only remedy against unjust awards. The Committee has no difficulty in rejecting either suggestion. In its view, Article 52(1) should be interpreted in accordance with its object and purpose, which excludes on the one hand, as already stated, extending its application to the review of an award on the merits and, on the other, an unwarranted refusal to give full effect to it within the limited but important area for which it was intended.⁹³²

501. Notwithstanding this now well-established line of authority rejecting the restrictive approach, there is still some FIAT authority that supports the restrictive approach, particularly in relation to the interpretation of provisions that attempt to carve out exceptions to generally established rules.⁹³³ A questionable position was taken by the *Noble Ventures* tribunal when it considered restrictive interpretation to be connected to Article 31 of the Vienna Convention.⁹³⁴ There is nothing in the Vienna Convention Rules that speaks of a requirement to apply them restrictively.

502. The general rejection of the restrictive interpretation based on the view that the Vienna Convention Rules are the rules to be applied is a notable example of the effect that the Vienna Convention Rules has had on international law. In this context, it must be asked whether the failure to adopt the restrictive approach in the Vienna Convention Rules has tilted the balance from an interpretation in favour of State sovereignty to one favouring the investor. The *Loewen* tribunal, for instance, considered that

[t]he text, context and purpose of Chapter Eleven [of the NAFTA] combine to support a liberal rather than a restricted interpretation of the words ‘measures adopted or

⁹³² *MINE (Annulment)*, at para. 4.05. A similar emphasis was placed on the object and purpose in the interpretation of the same ICSID Convention provision by the tribunal in *Klöckner (Annulment)*, at para. 3 (‘application of [Article 52(1) of the ICSID Convention] demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention) and para. 119 (interpreting Article 52(1)(e) of the ICSID Convention, the tribunal adopted ‘neither a narrow interpretation nor a broad interpretation, but bears in mind the customary principles of treaty interpretation and, in particular, the objective of the Convention and of the system it establishes’).

⁹³³ See, e.g., *El Paso*, at para. 77. See also *SGS v Pakistan*, at para. 171; and Declaration of Antonio Crivellaro in *SGS v Philippines (Jurisdiction)*, at para. 10 (‘when a provision which is intended to confer an advantage to a certain party, here Article VIII(2), may have two meanings, one should retain the meaning which is less restrictive or more favourable to the beneficiary’).

⁹³⁴ *Noble Ventures (Award)*, at para. 55. On this point see Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’, 3(2) *Transnational Dispute Management* (2006), at 5-6.

maintained by a Party', that is, an interpretation which provides protection and security for the foreign investor and its investment.⁹³⁵

503. A number of other FIATs have taken similar approaches that favour investors.⁹³⁶ The tribunal in *Noble Ventures* exhibited concern regarding this pro-investor trend when it stated that 'it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors'.⁹³⁷ Nevertheless, it considered that in the circumstances before it, such an interpretation was justified.⁹³⁸ The issue of a pro-investor bias is dealt with in Section G above.

I. NEGOTIATION PERIODS

504. Express provisions in investment treaties often stipulate that once a dispute arises, a fixed period of time for negotiation or consultation must expire before an arbitration claim may be instituted.⁹³⁹ The interpretation of these negotiation provisions has been an area in which—exceptionally—FIAT practice has generally not been consistent with the Vienna Convention Rules.

⁹³⁵ *Loewen (Jurisdiction)*, at paras. 50-53.

⁹³⁶ In *Occidental (Award)*, at para. 173, the tribunal held the term 'in like situations' as found in the MFN clause in the Ecuador-US BIT (Article II(1)) 'cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers'. See also *Tokios (Jurisdiction)*, at para. 68 (citing with approval C.F. Amerasinghe, who wrote 'every effort should be made to give the Centre jurisdiction by the application of the flexible approach', in Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 214); *SGS v Philippines*, at para. 116; *Mondev*, at para. 91; and *CSOB (Jurisdiction)*, at para. 64.

⁹³⁷ *Noble Ventures (Award)*, at para. 52.

⁹³⁸ The justification for the pro-investor interpretation resulted from the application of the principle of effectiveness. This approach should be considered as exceptional and tribunals need to be mindful of the words of *Oppenheim* in these types of circumstances: '[t]he doctrine of effectiveness is ... not to be thought of as justifying a liberal interpretation going beyond what the text of a treaty justifies'. *Oppenheim*, *supra* note 4, at 1281.

⁹³⁹ A typical example of such a provision is found in the 1999 Italy-Jordan BIT. Article 9 of that BIT provided that, as far as possible, a dispute should be settled amicably. However, if the dispute could not be settled amicably within six months from the date of a written application for settlement the investor could submit the dispute either to the host State's courts or to ICSID arbitration. This provision was subject to interpretation in *Salini v Jordan (Jurisdiction)*, at para. 66. See also Article VII of the Argentina-US BIT at issue in *Azurix (Jurisdiction)*, at para. 55.

505. FIATs have justified the exceptional treatment of these provisions on the basis that they constitute procedural rules rather than jurisdictional provisions. For example, the tribunal in *SGS v Pakistan* observed that FIATs ‘have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature’.⁹⁴⁰ The underlying rationale emphasises that the failure to satisfy jurisdictional provisions necessarily results in a determination that the tribunal lacks jurisdiction *ab initio* but unfulfilled procedural provisions result only in a delay of proceedings.⁹⁴¹ According to the *Bayindir* tribunal, preventing the commencement of arbitration until the expiry of the negotiation period, i.e., in contravention of the actual language of the provision, would amount ‘to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties’.⁹⁴² The *SGS v Pakistan* tribunal explained:

it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal.⁹⁴³

506. In *Bayindir*, the six-month negotiation period under the relevant BIT commenced upon written notification by the investor. The tribunal observed that the non-fulfilment of this notice requirement was not fatal to the investor’s case because ‘to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one’s advantage’.⁹⁴⁴

⁹⁴⁰ *SGS v Pakistan*, at para. 184.

⁹⁴¹ See, e.g., *Ethyl (Jurisdiction)*, at paras. 59, 76-88. See also *Lauder*, at para. 187; and *Bayindir*, at para. 99.

⁹⁴² *Bayindir*, at para. 102. See also *LESI*, at Pt. II, para. 32(iv) (a six month waiting period ‘is not absolute, and that it should be waived when it is obvious that any conciliation attempt would be doomed given the clearly demonstrated attitude of the other party’); and *Bayindir*, at para. 99 (procedural rules are ‘non-absolute’ in character). See also *Mondev*, at para. 44, as to the absolute nature of certain conditions precedent to submitting a claim and the more flexible approach to other conditions. See similarly, *Lauder*, at paras. 189-191.

⁹⁴³ *SGS v Pakistan*, at para. 184.

⁹⁴⁴ *Bayindir*, at para. 100. In *Wena Hotels (Jurisdiction)*, at 87, Egypt withdrew its objection that the procedural time periods for filing claims had not expired. It noted during oral argument that even if the

507. The above approach tends to place significant weight on pragmatic considerations rather than apply the rules of interpretation. In effect, these negotiation periods are clear and unambiguous but are not interpreted according to their ordinary meaning. The *Bayindir* tribunal purported to apply the Vienna Convention Rules to the negotiation period in question in the following passage:

Determining the real meaning of Article VII of the BIT is a matter of interpretation. Pursuant to the general principles of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, and consistently with the practice of previous ICSID tribunals dealing with notice provisions, this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision.⁹⁴⁵

508. For the tribunal to have restricted the interpretative analysis to solely the object and purpose is a rather selective application of the Vienna Convention Rules, particularly when it is used to reduce to naught what is a patently unambiguous text. Also, it may be questioned why the tribunal referred to the ‘real meaning’ rather than the ‘ordinary meaning’. The implication here appears to be that the former may not have necessarily been the ordinary meaning of the provision in dispute.

509. The *Generation Ukraine* tribunal was clearly mindful of this anomalous FIAT practice and invoked the principle of effectiveness to observe:

This Tribunal would be hesitant to interpret a clear provision of the BIT in such a way so as to render it superfluous, as would be the case if a “procedural” characterisation of the requirement effectively empowered the investor to ignore it at its discretion.⁹⁴⁶

510. A better approach than purporting to interpret a negotiation provision is perhaps to explain that compelling reasons exist for the consultation provisions not to

objection were granted, it could easily have been rectified and would have had little practical effect other than delaying the proceedings. See also *TSA Spectrum (Award)*, at para. 112 (‘despite the fact that the ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the case on the ground of failure to observe the formalities in Article 10(3) [of the Argentina-Netherlands BIT], since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter.’).

⁹⁴⁵ *Bayindir*, at para. 96 (footnote omitted). But see *Maffezini*, at para. 27 (applying Article 31 and implicitly emphasising the ordinary meaning criterion to interpret a treaty provision requiring the dispute to be submitted to a competent contracting State tribunal for a fixed period before arbitration is instituted).

⁹⁴⁶ *Generation Ukraine (Award)*, at para. 14.3.

be applied. One such justification may be that it was unlikely that fruitful negotiations would have taken place had the time-period run its course or that a substantial part of the negotiation period had elapsed and it was most unlikely that the matter could have resolved before its end.⁹⁴⁷ Another justification for this approach is evident in *Metalclad*. The tribunal in that case indicated that there may be no need to enforce procedural rules if the complaining party suffers no prejudice.⁹⁴⁸ And, as the *Bayindir* tribunal appears to indicate, a further justification may arise from the conduct of the host-State, precluding it from relying on those procedural provisions or signalling that it has waived or is not adhering strictly to those provisions.⁹⁴⁹ At least by explicitly invoking these other reasons, it indicates that the situation is not strictly one in which rules of treaty interpretation are applicable. Strained and distorted applications of the Vienna Convention Rules would therefore be prevented.

511. A negative consequence produced by the general FIAT approach to negotiation periods is the detriment to investors who are concerned to adhere to the ordinary meaning of the provisions of the relevant BIT by waiting for the stipulated negotiation period to elapse. By adopting this approach they are likely to suffer extra costs and financial loss, which would not be incurred by other investors who do not comply with those procedural waiting periods.⁹⁵⁰

⁹⁴⁷ *Lauder*, at paras. 187-8; and *TSA Spectrum (Award)*, at para. 111. See also *SGS v Pakistan*, at para. 184; and *Bayindir*, at para. 102. There is no suggestion here that treaty based negotiation periods are *per se* inefficient. If a claim can be settled by negotiation and subsequent agreement, that may be a highly efficient dispute settlement option.

⁹⁴⁸ *Metalclad (Award)*, at para. 69.

⁹⁴⁹ *Bayindir*, at paras. 101-102. On this issue, see generally Weeramantry, 'Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: The Practice of the Iran-United States Claims Tribunal', 27 *Netherlands Yearbook of International Law* 265 (1996)).

⁹⁵⁰ For instance, in *Tokios*, the ICSID notified the parties requesting arbitration that the dispute had not been negotiated for six months as required by Article 8 of the applicable Ukraine-Lithuania BIT. In response, those parties withdrew their request for arbitration and reinstated the request after the required period for negotiation had elapsed. *Tokios (Jurisdiction)*, at para. 7. *AAP* is another case in which the claimant appears also to have waited for the negotiation period to expire. See *AAP*, at para. 3. Contrast this with *SGS v Pakistan* or *Lauder*, in which the premature filing of the case did not result in the withdrawal of the requests.

512. There may also be some alternative strategies to address this problem. In *Ethyl*, for example, the claimants ‘jumped the gun’ by filing a claim before the expiry of the procedural waiting period. The tribunal, in allowing the arbitration to proceed, nevertheless ordered that the claimant should be made to bear the costs of the proceedings in so far as these issues were involved.⁹⁵¹ In the case of ICSID arbitrations, it may be helpful for a more vigilant role to be played by the ICSID Secretariat to ensure compliance with these negotiation periods during the registration phase of the claim. This would ensure fairness and equal treatment among investor claimants. Having the issue dealt with by the Secretariat (in a consistent manner for every case filed) before it becomes an item of contention during proceedings is an option that needs consideration.

* * *

513. This ends Chapter VI and also brings to a close the main body of the thesis. The remaining task is to set out in the next Chapter the conclusions that can be drawn from the research and analysis presented in foregoing pages.

⁹⁵¹ *Ethyl (Jurisdiction)*, at para. 88

Chapter VII

CONCLUSIONS

Chapter outline: This final Chapter addresses the three core objectives of the thesis. In so doing, it also serves to provide a summary of the research findings. Section A discusses whether FIAT treaty interpretation practice is consistent with the practice of other international courts and tribunals. Section B assesses whether the Vienna Convention Rules are suitable for application in investor-State treaty disputes. Section C concludes the thesis with an evaluation of the contribution of FIAT treaty interpretation jurisprudence to international law. Also relevant to this Chapter is Annex IV to the thesis, which presents a number of recommendations formulated in response to treaty interpretation problems revealed during the research.

A. CONSISTENCY IN PRACTICE OF FIATS AND OTHER INTERNATIONAL COURTS AND TRIBUNALS

514. The task of this Section is to determine whether FIAT practice is consistent with the treaty interpretation practice generally adopted by other public international law courts and tribunals. To attain this end, a comparison has been made between the numerous thesis sub-sections headed ‘International Law Practice’ and ‘FIAT Practice’. As stated at the outset of the thesis, the former sub-sections are not intended to provide a comprehensive survey of the decisions of all international courts and tribunals. Rather, the purpose of these sub-sections is to facilitate a general comparison with FIAT practice.

515. As Chapter I indicates, prior to the commencement of the research, two of the thesis findings thought to be possible were (i) that FIATs pay a high degree of lip service to public international law rules of treaty interpretation and fail to apply them

properly; and (ii) in comparison with other international courts and tribunals, FIATs are more open to drawing guidance from domestic law approaches to interpretation. These hypotheses were due to (i) the commercial nature of foreign investment and (ii) the commercial backgrounds of many FIAT arbitrators. Consequently, a finding of a specific FIAT regime of interpretation or *lex specialis* (for example, a hybrid of international and domestic law) was contemplated as possible. However, general trends in the directions of these contemplated findings were not evidenced in the research results.

516. The overall conclusions to be drawn from the awards reviewed for this thesis are that (i) domestic interpretative concepts are very rarely applied to construe treaties and (ii) many FIATs expressly recognise the Vienna Convention Rules and attempt to apply them (although in varying degrees) when interpreting treaties.⁹⁵² Only one instance of an application of a domestic interpretation rule was found: the *Pope & Talbot* tribunal invoked a principle contained in domestic statutory interpretation text to determine the applicability of treaty words in the plural form to words in the singular.⁹⁵³ Any hypothesis concerning the emergence of a FIAT treaty interpretation *lex specialis* for international investment law thus cannot be sustained. Indeed, the research has drawn attention to a distinctive symmetry in the treaty interpretation approaches of FIATs and those of international courts and tribunals.

517. A comparison between the practice of FIATs and other international courts and tribunals in applying the Vienna Convention Rules as set out mainly in Chapter III leads to a number of specific findings:

- a. Numerous FIATs have expressed the view that the Vienna Convention Rules reflect customary international law treaty interpretation rules.

⁹⁵² It should be noted that the finding in point (ii) is confirmed in Kaufmann-Kohler, 'Interpretation of Treaties: How do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?', in Mistelis and Lew, *Pervasive Problems in International Arbitration* 256 (2006), at 274-275 ('An extensive review of arbitral awards shows that arbitrators do apply treaty interpretation rules rather conscientiously, with variations of course, some being more text-bound and others more intent-bound.').

⁹⁵³ *Pope & Talbot (Merits, Phase 2)*, at para. 37. See Chapter VI, Section C.

This is in harmony with the practice of other international courts and tribunals.⁹⁵⁴

- b. In each instance where a FIAT interprets a treaty, rarely does it apply all the criteria set out in the Vienna Convention Rules. As has been suggested in Chapter III, Section A, it would be too inefficient and overly burdensome to require tribunals to apply all Article 31 interpretative elements for every interpretation. FIATs apply a particular element only where it is deemed necessary. The manner and the degree to which Article 31 is applied vary considerably from tribunal to tribunal. This practice of FIATs, when viewed as a whole, bears a marked resemblance to the treaty interpretation practice of international courts and tribunals.⁹⁵⁵
- c. A large proportion of FIATs and other international courts and tribunals have given prominence to the text of the treaty. By implication, the ordinary meaning criterion has thus been considered more important than the other Article 31 criteria. This practice may not sit easily with the absence of a hierarchy in Article 31, but it reflects the majority view in the jurisprudence reviewed that the treaty text is often the best evidence of the agreement between the State parties.⁹⁵⁶
- d. Readily evident similarities are found in the practice of FIATs and international courts and tribunals concerning the Article 31(1) context criteria. Both groups provide examples of wide contextual examination, which reach into areas beyond the terms of the treaty, such as other relevant treaties and instruments. This liberal practice as to the scope of the context is not fully consistent with the Vienna Convention Rules, in which the context specifically relates to the 'terms of the treaty'.⁹⁵⁷
- e. The use of the object and purpose criterion by FIATs is congruent with the practice of other international courts and tribunals. For example, the general practice of both groups is to consider that a treaty preamble is an important means of determining its object and purpose and it is not uncommon in both groups to assign a subordinate role to the object and purpose when weighed against a treaty's text.⁹⁵⁸

⁹⁵⁴ See Chapter II, Section D.

⁹⁵⁵ See Chapter III, Section A.

⁹⁵⁶ See Chapter III, Sections B(1) and B(3).

⁹⁵⁷ See Chapter III, Section B(4).

⁹⁵⁸ See Chapter III, Section B(5).

- f. The practice of FIATs and that of other international courts and tribunals have strong parallels in that they both have produced relatively little jurisprudence in connection with the Article 31(1) good faith criterion,⁹⁵⁹ the context criterion in Article 31(2)⁹⁶⁰ and the Article 31(4) special meaning criterion.⁹⁶¹
- g. FIAT practice relating to Article 31(3)(a) and (b) is distinct from the practice of other international courts and tribunals in the sense that FIATs have dealt with some unique situations. Two notable examples of this unique FIAT jurisprudence are found in (i) the subsequent concordance of NAFTA States' views as expressed through the FTC and (ii) the consideration in *Aguas del Tunari* of Dutch parliamentary statements and the response from the Dutch Legal Advisor.⁹⁶²
- h. FIATs and other international courts and tribunals both acknowledge that Article 32 is a subsidiary means of interpretation. However, at the same time many decisions emanating from both groups use Article 32 prior to a full application of the Article 31 criteria.⁹⁶³ This practice is contrary to the Vienna Convention Rules.
- i. FIATs do not require a restrictive interpretation of treaties to protect the sovereignty of a State. This practice is consistent with the contemporary practice of international courts and tribunals.⁹⁶⁴

518. The following points draw conclusions from the interpretative methods examined in Chapter V concerning other means of interpretation. It will be recalled that these methods are not expressly mentioned in the Vienna Convention Rules but are frequently invoked without indicating an Article 31 or 32 basis for their use.

- a. Despite the absence of a precedent system, reference to prior decisions or awards to interpret treaties is a prominent feature of the interpretative practice of both FIATs and other international courts and tribunals. This finding is confirmed by the Fauchald empirical analysis, which concluded that the use of other decisions and awards

⁹⁵⁹ See Chapter III, Section B(2).

⁹⁶⁰ See Chapter III, Section C.

⁹⁶¹ See Chapter III, Section E.

⁹⁶² See Chapter III, Section D(2).

⁹⁶³ See Chapter IV, Section A.

⁹⁶⁴ See Chapter VI, Section H.

was by far the most frequent interpretative argument employed by FIATs.⁹⁶⁵

- b. Both FIATs and international courts and tribunals refer to other treaties, instruments or materials as a guide to interpretation of the treaty in dispute. The research suggests that FIATs as opposed to international courts and tribunals tend to make more comparisons with other treaties.⁹⁶⁶ The more frequent deployment of this comparative method by FIATs is likely a result of the large number of BITs that contain seemingly similar provisions. The pool of relevant treaties that may be used by other international courts and tribunals for comparative purposes usually tends to be smaller.
- c. The reliance on scholarly opinion is an area in which FIAT practice diverges from the approach taken by the ICJ. The ICJ is reticent in using scholarly literature to support its findings. This contrasts sharply with FIAT utilisation of scholarly literature, which the Fauchald empirical analysis found was the second most frequent interpretative criterion employed by FIATs.⁹⁶⁷ The difference in ICJ practice, as discussed in Chapter IV, may be explained by the diplomatic context in which that court operates.
- d. FIAT and international court and tribunal decisions have by and large used the principle of effectiveness consistently.⁹⁶⁸ Although on the basis of the research a general conclusion as to the frequency of use of the effectiveness principle by international courts and tribunals cannot be made, the awards reviewed show that FIATs have resorted to this principle regularly.

519. One of the rare fields in which FIATs do not regularly apply the Vienna Convention Rules (or at least the principles that they embody) is in respect of investment treaty provisions concerning pre-arbitration settlement periods. This is an exceptional area in which treaty interpretation practice of a number of FIATs fails to

⁹⁶⁵ See Chapter V, Section B.

⁹⁶⁶ See Chapter V, Section C.

⁹⁶⁷ See Chapter V, Section D.

⁹⁶⁸ See Chapter V, Section F.

comport with international treaty interpretation rules. No comparable international court or tribunal practice was found in this regard.⁹⁶⁹

B. SUITABILITY OF VIENNA CONVENTION RULES FOR INVESTOR-STATE TREATY DISPUTES

520. The research and analysis set out in this thesis demonstrates that the Vienna Convention Rules are in considerable measure suitable for application in investor-State treaty disputes. However, two exceptions to this general assessment were found. Problems result from (i) the inability of an investor to access the preparatory material of investment treaties and (ii) the potential of a pro-investor bias emerging from the application of the object and purpose criterion to interpret investment treaties. It must be added here that many interpretative problems may not result from the treaty interpretation rules themselves but may be attributable to the broad wording of investment treaties, which are easily susceptible to many divergent interpretations.

521. This Section will commence first with an examination of some positive aspects of the application of the Vienna Convention Rules to investment treaty arbitration and the interpretation problems created by the broad language utilised to draft BITs. It will then proceed to discuss the problems related to preparatory work availability and pro-investor bias identified above.

1. Positive Aspects of the Vienna Convention Rules

522. Any assessment of the suitability of the Vienna Convention Rules must be conducted in the light of the near-impossible task faced by treaty drafters: the eradication of all ambiguity from treaty texts. This problem has a direct impact on interpreters because no regime of interpretation—international or otherwise—automatically transforms ambiguous language into a precise meaning that satisfies all. Often, two or more equally valid interpretations exist from which one must be

⁹⁶⁹ See Chapter VI, Section I.

selected. Treaty interpretation has thus been famously described as ‘a delicate art rather than a strict science’.⁹⁷⁰

523. Given this background, the Vienna Convention Rules are an easy target for critics. As we have seen, they have been criticised as (i) being too general to be of practical use and (ii) enabling the interpreter to arrive at any desired outcome.⁹⁷¹ Despite these adverse comments, they provide a logical, structured and inclusive set of rules that are universally considered to express customary international law.

524. A valuable characteristic of the Vienna Convention Rules that makes them suitable for application in investment treaty arbitration is their ability to enhance decision-making objectivity. Before discussing this quality of the Rules, attention must be drawn to the circumstances of investment arbitration that make objective decision-making especially important. Investment arbitrations often involve extremely sensitive and far-reaching public issues that call for as much objectivity as possible to be exercised by a tribunal. The more objective a decision is (and is seen to be), the greater the legitimacy of the decision-making process. Some of the significant issues that arise in investment arbitration are listed below.

- a. *The extraordinary monetary amounts in dispute:* Astronomic monetary amounts may be claimed in investment treaty arbitrations. USD 33 billion, for instance, has been sought in *Yukos Universal Ltd. v Russian Federation* and its associated cases.⁹⁷² If an investor is successful in bringing such immense claims, the compensation to be paid impacts not just on the respondent State but every one of its citizens. A case on point is *CME*. Pursuant to the final award the Czech Republic was ordered to pay, and did pay, USD 355 million to CME. According to the Czech Premier, this amount was equivalent to the Czech Ministry

⁹⁷⁰ Amerasinghe, ‘The Jurisdiction of the International Centre for the Settlement of Investment Disputes’, 19 *Indian J. Int’l Law* 166 (1979), at 167.

⁹⁷¹ See Chapter II, Section C.

⁹⁷² A pending Energy Charter Treaty arbitration administered by the Permanent Court of Arbitration, registered 3 February 2005, see <http://www.encharter.org/>.

of Health's annual budget and it is said that Czech taxes were increased to fund the payment.⁹⁷³

- b. *Allegations of arbitrator self-interest*: It has been alleged that because investment arbitrators are not tenured, they are tempted to further their careers by interpreting the law or arriving at outcomes in ways that will please those who may appoint them in future cases.⁹⁷⁴
- c. *Disparity of investor economic power vis-à-vis the host State*: Many transnational corporations have annual sales that are larger than the gross national products of more than half the world's nations. As an example, Siemens—a corporation known in the investment arbitration community for its claim against Argentina—has sales that are six times the GNP of Jamaica.⁹⁷⁵ Claims brought by these large multinationals against relatively small host States give rise to public perceptions that the economic disparities distort the process in favour of the corporation because, for example, the host State is unable to afford legal representation that will match the expert and highly-paid lawyers retained by the claimant corporation.
- d. *Investment's impact on host State citizens' human rights*: The investments at issue in cases before FIATs may be perceived to impact significantly on the living standards, health and environment of citizens in the host State. As a result, FIAT decisions may be subject to intense and highly emotional public scrutiny. In *Aguas del Tunari*, for example, compensation was sought in respect of the termination of a water concession. The termination was made after large-scale, violent protests erupted in Bolivia to oppose the concession and reassert citizens' right to water, the delivery of which had been privatised under the concession.⁹⁷⁶

⁹⁷³ Desai and Moel, 'Czech Mate: Expropriation and Investor Protection in a Converging World', 12 *Review of Finance* 221 (2008), at 238-239. Professor Brownlie's Separate Opinion in the case noted that relative to population size and gross national income, the amount claimed against the Czech Republic (USD 500 million) would have been the equivalent of USD 131 billion for the United States. *CME (Final Award)*, Brownlie Separate Opinion, at para. 80.

⁹⁷⁴ Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 167-175.

⁹⁷⁵ Joseph Nye, *The Paradox of American Power: Why the World's only Superpower Can't Go it Alone* (2002), at p. 74.

⁹⁷⁶ Vis-Dunbar and Peterson, 'Bolivian Water Dispute Settled, Bechtel Forgoes Compensation', *Investment Treaty News*, 20 January 2006. See also Report of the UN High Commissioner for Human Rights, 'Economic, Social and Cultural Rights: Human Rights, Trade and Investment', UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, at para. 51.

525. Decisions made in cases involving these types of issues must place a premium on objectivity (both actual and perceived) if confidence in the system is to be maintained. In this context, the Vienna Convention Rules possess value because they stress the application of objective criteria: i.e., the ordinary meaning of a treaty's terms in their context and in the light of the treaty's object and purpose. What is 'ordinary' is not what is considered ordinary to the interpreter but should be evaluated on a more generally accepted level. The context should be derived from the terms of the treaty, not from any other sources that the interpreter personally considers relevant.⁹⁷⁷ The object and purpose is essentially driven by the treaty's text, particularly its preamble. All these objective criteria demand that interpreters avoid drawing from the well of their own subjective notions for interpretative sustenance. In turn, this helps diminish (but, of course, not eliminate) accusations of arbitrariness or arbitrator bias.⁹⁷⁸

526. The recognition of Articles 31 and 32 as a standard set of rules generally applied may also enhance the objectiveness of the interpretative process. As such, and if deployed consistently, they help satisfy an expectation of disputing parties that justice in their case will be dispensed on the basis that the same established interpretative rules will be applied in their case as they have been applied to all similarly placed parties.⁹⁷⁹

527. Another positive aspect of the Vienna Convention Rules that renders them suitable for investment treaty arbitration is predictability of interpretative technique. Those Rules have by and large dispensed with the need for time-consuming argument

⁹⁷⁷ But as the research has shown, many FIATs and other international tribunals, in contrast to the Vienna Convention Rules, refer to contexts that are external to the treaty. This could potentially be seen as injecting subjective views into the interpretative process.

⁹⁷⁸ In this regard, see the comment made long ago by Sir Eric Beckett during the drafting phase of the Institute of International Law's resolution on treaty interpretation. Sir Eric Beckett, 'Comments [on the report by Hersch Lauterpacht]', 43(I) *AIDI* 435 (1950), at 436 ('The fundamental reason for the existence of rules of interpretation ... is to defend the court from the charges of reaching its conclusions on arbitrary or subjective grounds').

⁹⁷⁹ See, e.g., Waldron, 'How Judges Should Judge', *New York Review of Books*, 10 August 2006, p. 54, at p. 59.

on the choice of interpretative rules to be applied. Because of the general acceptance and application of Articles 31 and 32, it may be confidently said that the rules to be used to interpret investment treaties are now known in advance to all parties and the arbitral tribunal. While this helps to reduce uncertainty associated with the interpretative process, difficulty remains in predicting the weight a tribunal will assign to the different Vienna Convention Rules criteria and also to what extent the tribunal will consider criteria not explicitly mentioned in the Rules.

528. The above reasons present a strong argument for demanding that FIATs should place a priority on the diligent application of the Vienna Convention Rules.

2. *Generality of BIT Provisions*

529. The problems encountered in applying the Vienna Convention Rules to interpret investment treaties have resulted on many occasions not from any inherent deficiencies in those Rules but from the lack of specificity provided in BIT provisions. The need to draft broad treaty provisions is well understood. Drafters are not omniscient. They cannot formulate specific language to cover every future contingency. Broad wording is therefore adopted. Sufficient elasticity is thus injected into the text to apply to these unforeseen situations where the circumstances warrant. But this drafting technique has its drawbacks. As an UNCTAD report has remarked:

the increase in investment disputes has tested the wisdom of negotiating IIAs [i.e., international investment agreements] with extremely broad and imprecise provisions. The broader and more imprecise a particular text is, the more likely that it will lead to different, and even conflicting, interpretations. This will increase not only the likelihood of a dispute arising between the investor and the host country, but also the possibility of delegating to the arbitral tribunal the task of identifying the meaning that the disputed provision should have. Clearly, one of the objectives of IIAs is to foster predictability and certainty for investors, but also for host countries, and in this regard, having investment provisions that are drafted broadly and imprecisely does not serve the interests of either of those parties.⁹⁸⁰

⁹⁸⁰ *Investor-State Dispute Settlement and Impact on Investment and Rulemaking*, Paper by UNCTAD Secretariat (2007), UN Doc. UNCTAD/ITE/IIA/2007/3, at p. 92. See also *ibid.*, at pp. 5 and 85; and McLachlan, Shore and Weiniger, *International Investment Law: Substantive Principles* (2007), at 268, para. 8.07 (indicating that the broad language of investment treaties is one cause of the difficulty in determining the meaning of expropriation).

530. The drafting of more comprehensive investment treaties that define rights and obligations with greater specificity is to be encouraged. More elaborately formulated investment treaties increase their clarity for all concerned, including State parties, investors and arbitrators. The possible outcomes of an interpretation are thus likely to be more predictable when compared to an interpretation of a broader worded treaty.

3. Investor Access to Preparatory Material

531. Public international law as traditionally understood has been described as ‘law between states, for states, by states’.⁹⁸¹ In this connection, virtually all of the Vienna Convention provisions are designed for application in disputes between States. No indication has been found that the application of the Vienna Convention Rules to a treaty dispute between a private investor and a State was fully contemplated by the drafters of the Vienna Convention Rules. As seen in Chapter VI, Section G, problems under the Vienna Convention Rules arise when a respondent State has access to an investment treaty’s preparatory work but the investor does not. This circumstance is not ameliorated by the general approach of home States, which have displayed a reluctance to furnish the relevant preparatory materials to investors and have avoided becoming involved in the dispute.

532. The Vienna Convention Rules are therefore not altogether suitable in this type of situation, especially if the preparatory work may influence the outcome of the interpretation. However, the Rules provide a limited degree of protection to investors without access to preparatory work because such material cannot be referred to in the primary interpretative analysis under Article 31 but only as a supplementary means under Article 32.

533. One way of redressing the imbalance is for a practice to be established whereby preparatory work relied on by States will not be admissible unless the preparatory work in its entirety is disclosed to the investor (with exceptions for

⁹⁸¹ Wälde and Weiler, *supra* note 62, at 160.

confidential material). But as the *Pope & Talbot* case illustrates, it will be difficult to be absolutely certain that all the materials have been disclosed.

4. *Potential Pro-Investor Bias*

534. As discussed in Chapter VI, Section G, the potential for the Article 31(1) object and purpose criterion to result in a pro-investor interpretative bias has caused some concern as to the suitability of the Vienna Convention Rules for investment treaty arbitration. A bias that unquestioningly requires interpretations to be made in favour of investors lacks the requisite degree of impartiality and undermines the legitimacy of the investor-State dispute resolution system. FIATs rightly have displayed an increasing sensitivity to this issue. The holding by the *Noble Ventures* tribunal that investment treaty clauses cannot interpret clauses exclusively in favour of investors represents a step in the right direction to address this potential imbalance.⁹⁸²

C. CONTRIBUTION OF FIAT PRACTICE TO INTERNATIONAL LAW

535. Every Chapter in this thesis serves to demonstrate that FIATs have made a substantial contribution to the international law of treaty interpretation.⁹⁸³ The approaches to treaty interpretation embodied in the FIAT awards display many encouraging signs of a precocious maturity in the short but exceedingly active life of investment treaty arbitration. Interpretation-related jurisprudence contained in FIAT awards and commentary on them has helped to understand to a considerable degree the operation of the Vienna Convention Rules, as well as their limitations.

⁹⁸² See Chapter VI, Section G.

⁹⁸³ It should be added that another discipline of international law that appears to have a similarly voluminous and instructive body of jurisprudence is the law and practice relating to the WTO. See, e.g., Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009). Comparisons between FIAT and WTO decisions on interpretation could prove to be an insightful exercise.

536. An insightful explanation as to why FIAT jurisprudence has proven to be such fertile ground for the interpretative approaches and techniques has been put forward by Wälde and Weiler:

the process [of investor-State arbitration] is considerably more promising for the future of international norm-development. This is because there will likely be much less need for claimants' counsel to 'pull their punches' as can be the case when potential claims are raised within the context of state-to-state dispute-settlement. Here, counsel representing governments are forever mindful of how 'too broad' (or too good) an argument made in one case might precipitate a future case in which he or she will be forced to defend. This special prudence is very visible in WTO litigation (in particular by the US and EU, present in most WTO cases). An investor plaintiff, on the other hand, should have few compunctions about deploying any argument or precedent that might further its cause.⁹⁸⁴

537. The jurisprudence detailed in Chapters III and IV on FIAT applications of Vienna Convention Articles 31 and 32 would of itself be sufficient to conclude that FIATs have made a significant contribution to international law. However, the evaluation should not end there. Numerous other FIAT contributions to treaty interpretation law are apparent from this thesis. Some of the more notable are the following:

- a. The *AAP* tribunal's articulation of six interpretative rules is valuable because they facilitate an understanding of treaty interpretation rules that existed prior to the Vienna Convention Rules. They also illustrate the problems faced before the Vienna Convention Rules became accepted as the common currency in treaty interpretation, in particular the need for a tribunal to formulate or determine on a case by case basis the specific interpretative rules to be applied.⁹⁸⁵
- b. The attention that FIATs have drawn to the problems caused by emphasising the object of a treaty so as to favour the investor over the host State and the solutions FIATs have proposed will provide useful comparative material for other fields of international law in which treaties aim to protect a certain category of private persons against State conduct.⁹⁸⁶

⁹⁸⁴ Wälde and Weiler, *supra* note 62, at 168 (footnote omitted).

⁹⁸⁵ See Chapter VI, Section A.

⁹⁸⁶ See Chapter VI, Section G.

- c. FIATs have assisted in confirming that international law has moved away from the restrictive approach to treaty interpretation that calls for a narrow interpretation of clauses that limit a State's sovereignty.⁹⁸⁷
- d. FIATs have shown that the principle of effectiveness, although not explicitly mentioned in the Vienna Convention Rules, is one of the most prominent principles of treaty interpretation.⁹⁸⁸
- e. FIATs have contributed to the corpus of international law by casting light on the how the meaning of treaty terms may evolve over time, particularly from the changes resulting from the conclusion of thousands of BITs.⁹⁸⁹
- f. FIAT practice provides a substantial amount of guidance on the interpretation of silence in treaties. This is an area that is not often discussed in other international law jurisprudence.⁹⁹⁰
- g. The application by FIATs of legal maxims to interpret treaties also merits mention in this list of contributions. FIAT awards have applied in a number of practical situations maxims such as *expressio unius est exclusio alterius*, *generalia specialibus non derogant* and *ejusdem generis*. This has increased the understanding of how these maxims operate in international law.⁹⁹¹
- h. Although not strictly related to treaty interpretation, it is worth noting FIAT interpretations of domestic statutes that permit investor-State arbitration. The investor-State dispute resolution provisions of these statutes have been interpreted not by using domestic law but in the same way that unilateral declarations by States are interpreted by the ICJ. As explained in Chapter VI, Section D, this is a sensible approach, the uniqueness of which constitutes a valuable contribution to international law.

⁹⁸⁷ See Chapter VI, Section H.

⁹⁸⁸ See Chapter V, Section F.

⁹⁸⁹ See Chapter V, Section E.

⁹⁹⁰ See Chapter III, Section B(4).

⁹⁹¹ See Chapter V, Section G.

538. To conclude, one sees in FIAT jurisprudence many insightful applications of the Vienna Convention Rules and other interpretative techniques.⁹⁹² Some of these represent expositions of treaty interpretation rules that will leave an indelible imprint on the landscape of international law. Although a number of FIATs do not mention, fail to apply or misapply the Vienna Convention Rules, FIATs collectively have bequeathed a rich and voluminous corpus of jurisprudence on treaty interpretation. Any serious international law discourse on treaty interpretation practice in the future will be incomplete without reference to this important realm of jurisprudence.

* * *

⁹⁹² See in particular the detailed application and examination of treaty interpretation rules in *AAP*, *Plama (Jurisdiction)*, *Aguas del Tunari*, *Canadian Cattlemen* and *Hrvatska* (including Jan Paulsson's Individual Opinion).

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ANNEX I

COMPARISON BETWEEN ARTICLES 27-29 OF THE 1966 ILC DRAFT AND ARTICLES 31-33 OF THE VIENNA CONVENTION⁹⁹³

Article ~~27~~ 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in ~~e connexion~~ connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in ~~e connexion~~ connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the understanding agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article ~~28~~ 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article ~~27~~ 31, or to determine the meaning when the interpretation according to article ~~27~~ 31:

⁹⁹³ Underlined sections of text did not constitute a part of the 1966 ILC Draft Articles but were included in the Vienna Convention. The text appearing in strikethrough format constituted part of the 1966 Draft Articles but was omitted from the Vienna Convention. Alterations in capitalisation and punctuation have not been indicated.

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 29 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.^[994]
4. ~~Except in the case mentioned in~~ where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 31 and 28 32 does not remove, the meaning which as far as possible best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

* * *

⁹⁹⁴ In the 1966 ILC Draft Articles, paragraphs 3 and 4 were combined, forming one paragraph, namely, Article 29(3).

ANNEX II

COMPARATIVE TABLE OF DRAFT TREATY INTERPRETATION RULES

| | | | |
|--|--|---|--|
| <i>INSTITUTE RESOLUTION 1956</i> [46 AIDI (1956), at 364-5] | <i>WALDOCK THIRD REPORT 1964</i> [YILC (1964-II), at 8-10, 52-65] | <i>ILC DRAFT ARTICLES 1964</i> [YILC (1964-II), at 177-179, 199-208] | <i>ILC DRAFT ARTICLES 1966</i> [YILC (1966-II), at 217-226] |
|--|--|---|--|

GENERAL RULE(S)

| Article 1 | Article 70. General rules | Article 69. General rule of interpretation | Article 27. General rule of interpretation |
|---|--|---|---|
| <p>1. The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.</p> | <p>1. The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term —</p> <p>(a) in its context in the treaty and in the context of the treaty as a whole; and</p> <p>(b) in the context of the rules of international law in force at the time of the conclusion of the treaty. [See also Article 56 below.]</p> <p>2. If the natural and ordinary meaning of a term leads to an interpretation which is manifestly absurd or unreasonable in the context of the treaty as a whole, or if the meaning of a term is not clear owing to its ambiguity or obscurity, the term shall be interpreted by reference to —</p> <p>(a) its context and the objects and purposes of the treaty; and</p> <p>(b) the other means of interpretation mentioned in article 71, paragraph 2.</p> | <p>1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:</p> <p>(a) In the context of the treaty and in the light of its objects and purposes; and</p> <p>(b) In the light of the rules of general international law in force at the time of its conclusion.</p> <p>[Article 69(1)(b) was partially included in the 1966 ILC Draft Articles as Article 27(3)(c)]</p> | <p>1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.</p> |

[see below for Article 70(3)]

CONTEXT

Article 71. Application of the general rules

Article 69(2).

Article 27(2).

No specific provision.

1. In the application of article 70 the context of the treaty as a whole shall be understood as comprising in addition to the treaty (including its preamble) —
- (a) any agreement arrived at between the parties as a condition of the conclusion of the treaty or as a basis for its interpretation;
 - (b) any instrument or document annexed to the treaty;
 - (c) any other instrument related to, and drawn up in connexion with the conclusion of, the treaty.

The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion.

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

SUBSEQUENT AGREEMENT OR CONDUCT

Article 73. Effect of a later customary rule or a later agreement on interpretation of a treaty

Article 69(3).

Article 27(3).

No specific provision.

The interpretation at any time of the terms of a treaty under articles 70 and 71 shall take account of —
(a) the emergence of any later rule of customary international law affecting the subject-matter of the treaty and binding upon all the parties;
(b) any later agreement between all the parties to the treaty and relating to its subject-matter;
(c) any subsequent practice in relation to the treaty evidencing the consent of all the parties to an extension or modification of the treaty.

There shall also be taken into account, together with the context:
(a) Any agreement between the parties regarding the interpretation of the treaty;
(b) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation.

There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty;
- (b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

SPECIAL MEANING

Article 1(2).

If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.

Article 70(3)

Notwithstanding paragraph 1, a meaning other than its natural and ordinary meaning may be given to a term if it is established conclusively that the parties employed the term in the treaty with that special meaning.

Article 71. Terms having a special meaning

Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.

Article 27(4).

A special meaning shall be given to a term if it is established that the parties so intended.

SUPPLEMENTARY MEANS OF INTERPRETATION

| Article 2 | Article 71(2) | Article 70. Further means of interpretation | Article 28. Supplementary means of interpretation |
|---|--|---|---|
| <p>1. In case of a dispute brought before an international tribunal it will be for the tribunal, while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.</p> <p>2. Amongst the legitimate means of interpretation are the following:</p> <p>(a) Recourse to preparatory work;</p> <p>(b) The practice followed in the actual application of the treaty;</p> <p>(c) The consideration of the objects of the treaty.</p> | <p>Reference may be made to other evidence or indications of the intentions of the parties and, in particular, to the preparatory work of the treaty, the circumstances surrounding its conclusion and the subsequent practice of parties in relation to the treaty, for purposes of —</p> <p>(a) confirming the meaning of a term resulting from the application of paragraph 1 of article 70;</p> <p>(b) determining the meaning of a term in the application of paragraph 2 of that article;</p> <p>(c) establishing the special meaning of a term in the application of paragraph 3 of that article.</p> | <p>Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:</p> <p>(a) Leaves the meaning of ambiguous or obscure; or</p> <p>(b) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.</p> | <p>Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:</p> <p>(a) Leaves the meaning ambiguous or obscure; or</p> <p>(b) Leads to a result which is manifestly absurd or unreasonable.</p> |

TREATIES IN TWO OR MORE LANGUAGES

| Article 74. Treaties drawn up in two or more languages | Article 72. Treaties drawn up in two or more languages | Article 29. Interpretation of treaties in two or more languages |
|---|---|--|
| <p>Not included.</p> <p>1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the texts of the treaty are authoritative in each language except in so far as a different rule may be laid down in the treaty.</p> <p>2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be considered an authentic text and be authoritative if —</p> <p>(a) the treaty so provides or the parties so agree; or</p> <p>(b) an organ of an international organization so prescribes with respect to a treaty drawn up within the organization.</p> | <p>1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.</p> <p>2. A version drawn up in a language other than one of those in which the text of the treaty was authenticated shall also be authoritative and be considered as an authentic text if:</p> <p>(a) The parties so agree; or</p> <p>(b) The established rules of an international organization so provide.</p> | <p>1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.</p> <p>2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.</p> |

**Article 75. Interpretation of treaties
having two or more texts or versions**

1. The expression of the terms of a treaty is of equal authority in each authentic text, subject to the provisions of the present article. The terms are to be presumed to be intended to have the same meaning in each text and their interpretation is governed by articles 70-73.

2. When a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity as to the meaning of the term is not removed by the application of articles 70-73, the rules contained in paragraphs 3-5 apply, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation is to prevail.

3. If in each of two or more authentic texts a term is capable of being given more than one meaning compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.

4. If in one authentic text the natural and ordinary meaning of a term is clear and compatible with the objects and purposes of the treaty, whereas in another it is uncertain owing to the obscurity of the term, the meaning of the term in the former text is to be adopted.

5. If the application of the foregoing rules leaves the meaning of a term, as expressed in the authentic text or texts, ambiguous or obscure, reference may be made to a text or version which is not authentic in so far as it may throw light on the intentions of the parties with respect to the term in question.

**Article 73. Interpretation of treaties
having two or more texts**

1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.

2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the different texts shall be adopted.

Article 29.

3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Not included.

PRINCIPLE OF EFFECTIVENESS

| | |
|--|---------------|
| Article 72. Effective interpretation of the terms (<i>ut res magis valeat quam pereat</i>) | |
| Not included. | Not included. |
| In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent — (a) with its natural and ordinary meaning and that of the other terms of the treaty; and (b) with the objects and purposes of the treaty. | |

INTER-TEMPORAL LAW

| | |
|---|--|
| Article 56. The inter-temporal law | Article 56. Application of a treaty in point of time |
| Not included. | Not included. |
| 1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. | |
| 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied. | |
| [See also Article 70(1)(b) above] | |
| 1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty. | |
| 2. Subject to Article 53, the provisions of a treaty do not apply to a party in relation | |

INSTITUTE RESOLUTION 1956
[46 AIDI (1956), at 364-5]

WALDOCK THIRD REPORT 1964
[YILC (1964-II), at 8-10, 52-65]

ILC DRAFT ARTICLES 1964
[YILC (1964-II), at 177-179, 199-208]

ILC DRAFT ARTICLES 1966
[YILC (1966-II), at 217-226]

to any fact or act which takes place or any situation which exists after the traty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

[See also Article 69(1)(b) above]

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ANNEX III

UMBRELLA CLAUSE COMPARATIVE TABLE

| Award | A | B | C | D | E |
|--|--------------------------------|---|---|---|---|
| <i>SGS v Pakistan</i> Art. 11 Swiss-Pakistan BIT | Either Contracting Party shall | constantly <u>guarantee</u> the observance of | the <u>commitments</u> it has entered into | with respect to the investments | of the investors of the other Contracting Party. |
| <i>SGS v Philippines</i> Art. X(2) Swiss-Philippines BIT | Each Contracting Party shall | <u>observe</u> | any <u>obligation</u> it has assumed | with regard to specific investments | in its territory by investors of the other Contracting Party. |
| <i>El Paso v Argentina</i> <i>LGE v Argentina</i> Art. II(2)(c) Argentina-US BIT | Each Party shall | <u>observe</u> | any <u>obligation</u> it may have entered into | with regard to investments. | — |
| <i>Salini v Jordan</i> Art. 2(4) Italy-Jordan BIT | Each Contracting Party shall | create and <u>maintain</u> in its territory | a <u>legal framework</u> apt to <u>guarantee</u> the investors the continuity of legal treatment, including the compliance, in good faith, of all <u>undertakings</u> assumed | with regard to each specific investor. | [reference to territory in column B] |
| <i>Eureko v Poland</i> <i>see para. 244</i> Art. 3(5) Netherlands-Poland BIT | Each Contracting Party shall | <u>observe</u> | any <u>obligation</u> it may have entered into | with regard to investors | of the other Contracting Party. |
| <i>Fedax v Venezuela</i> Art. 3(4) Netherlands-Venezuela BIT | Each Contracting Party shall | <u>observe</u> | any <u>obligation</u> it may have entered into | with regard to the treatment of investments | of nationals of the other Contracting Party. |
| <i>Noble Ventures</i> Art. II (2)(c) Romania-US BIT | Each Party shall | <u>observe</u> | any <u>obligation</u> it may have entered into | with regard to investments. | — |
| <i>Joy Mining v Egypt</i> Art. 2(2) UK-Egypt BIT | Each Contracting Party shall | <u>observe</u> | any <u>obligation</u> it may have entered into | with regard to investments | of nationals or companies of the other Contracting Party. |

ANNEX IV

RECOMMENDATIONS AND MATTERS REQUIRING FURTHER RESEARCH

1. *Promotion of 'respectful co-existence' between FIATs*: FIATs should be urged by the international investment law community, as far as possible, to avoid inconsistency. While it is recognised that FIATs have no obligation to follow treaty interpretations made by prior FIATs, at the least, a need for 'respectful co-existence' between FIATs is required, similar to what has been recommended to maintain a co-operative relationship between international judicial bodies whose competences may overlap.⁹⁹⁵ In a similar vein, domestic courts are increasingly showing respect for decisions foreign courts and are displaying concern for harmony in the interpretation of treaties by different courts. In *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority*, for example, the Australian Federal Court made the following pertinent observation: 'as a broad principle, it is obviously desirable that expressions used in international agreements should be construed, as far as possible, in a uniform and consistent manner by both municipal courts and international courts and panels to avoid a multitude of divergent approaches in the territories of the contracting parties on the same matter'.⁹⁹⁶ This type of mutual respect and comity should be an example that FIATs should strive to follow. If national courts, which generally are in no way bound by foreign court decisions, can take this approach, there is no reason why FIATs cannot follow suit. More research to explore ways for promoting consistency in treaty interpretations is needed.
2. *Submission rights for non-disputing States*: States should consider incorporating provisions into future BITs that grant the non-disputing State party to a BIT the opportunity, should it wish, to make submissions in an investment arbitration instituted under that BIT. Such a provision may follow

⁹⁹⁵ See, e.g., Carl-August Fleischhauer, 'The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea', 1 *Max Planck Yearbook of United Nations Law* (1997) p. 333; and the speech by Judge Rosalyn Higgins, in her capacity as President of the International Court of Justice, at the tenth anniversary of the International Tribunal for the Law of the Sea, 29 September 2006, available at <<http://www.icj-cij.org/court/index.php?pr=1880&pt=3&p1=1&p2=3&p3=1>>.

⁹⁹⁶ (1995) 129 ALR 401, at 415 per Spender, Einfeld and Tamberlin JJ. The Court in this case accorded substantial weight to relevant decisions of the European Court of Justice. See also *Savvin* (2000) at 511; *Kotsambasis* at 500 per Meagher J.A.. D'Agostino and Jones have adeptly articulated this very point in relation to the interpretation of the Energy Charter Treaty. See D'Agostino and Jones, 'Energy Charter Treaty: a Step Towards Consistency in International Investment Arbitration?', 25 *Journal of Energy and Natural Resources Law* 225 (2007), at 242. Those authors also suggest that to achieve consistency in cases where similar proceedings brought under the ECT are heard (1) by different tribunals and (2) at the same time, the temporary suspension of one set of proceedings may be required pending the conclusion of the other in order that the tribunals are given sufficient opportunity to work toward consistency with each other's awards. *Ibid.*, at 243.

Article 1128 of the NAFTA⁹⁹⁷ or perhaps even require the arbitral tribunal to notify the non-disputing State of any required interpretation of the relevant BIT. A filing of submissions by a non-disputing party should not be mandatory because it is understood that non-disputing State parties to BITs may not wish to be drawn into the dispute or may have other reasons why it wishes not to file such submissions. Although States may not feel a need for this type of provision in every BIT, the utility of such a clause in certain circumstances is evident in the letter by the Swiss government to the ICSID Secretariat expressing its concern that it was not consulted in the *SGS v Pakistan* proceedings in relation to the interpretation of the Switzerland-Pakistan BIT. The comments of the home State on the interpretation of the BIT may partially redress the imbalance in terms of access to the preparatory materials of that treaty vis-à-vis the investor and the host State.

3. *Requirement of reasons for non-use of Vienna Convention Rules:* Tribunals that do not refer to or apply the Vienna Convention Rules should be encouraged to explain why they have not done so.⁹⁹⁸ After all, a decision not to apply rules of customary international law ought not to be made lightly. The failure of international decisions to divulge the reasons why they did not apply the Vienna Convention Rules does not assist the development of those Rules. If a practice emerged in which reasons are stated as to why the rules were not applied, it would draw attention to areas or aspects of the Vienna Convention Rules in which extra care should be exercised or where alternative approaches or improvements to the Rules need to be considered.
4. *Introduction of uniformity clauses in treaties:* It is not recommended that provisions specifically requiring the application of the Vienna Convention Rules be incorporated into investment treaties. Such a requirement would impose a suffocating grip on arbitrators who may be able to apply or consider more economical and acceptable approaches outside of those Rules.⁹⁹⁹ However, a strategy to reduce divergent interpretations of future investment treaties may take the form of incorporating provisions to the effect that 'in the interpretation of this treaty, regard should be had to the need to promote uniformity in its application and interpretation'.¹⁰⁰⁰ On a practical level, by

⁹⁹⁷ That Article provides that any NAFTA party may make submissions to a NAFTA Tribunal on a question of an interpretation of NAFTA. See, e.g., *Metalclad v Mexico*, in which the Article was relied on by Canada, whose submission rejected Metalclad's interpretation of NAFTA Article 1110. *Metalclad*, at 218, para. 24. See also Friedman in 2(2) *Transnational Dispute Management* 45 (2005).

⁹⁹⁸ See, e.g., this author's remark in his case report on the Eritrea-Ethiopia Claims Commission, 101 *American Journal of International Law* 616 (2007).

⁹⁹⁹ In principle, however, the rules contained in Articles 31 and 32 of the Vienna Convention should always be applicable, irrespective of whether there is express reference to their use in a treaty, because they reflect rules of customary international law.

¹⁰⁰⁰ See, e.g., similar provisions contained in Article 7 of the Vienna Convention on the International Sale of Goods and Article 18 of the Rome Convention on the Law Applicable to Contract Obligations 1980.

itself, such instruction will not assure harmony in interpretation. It would seek simply to give added emphasis to the need to be mindful of other decisions and the expectations that the parties have as to predictability and consistency in decisions relating to the same or similar treaties. Also, the clause should make clear that it is not intended to establish any system of precedent.

5. *Modifications to the Vienna Convention Rules:* If ever an attempt is made to modify the Vienna Convention (a highly unlikely prospect in the near future), consideration should be given to amending Article 31(1) in order to clarify that the object and purpose to be taken into account may either be that of the treaty as a whole or a particular provision. Also, it would be advisable to incorporate a provision that explicitly refers to the principle of effectiveness in the Vienna Convention Rules given its constant and useful deployment in international and FIAT case law, and if only to draw attention to it as a fundamental principle of treaty interpretation that is of equivalent stature to most of the Article 31 criteria.
6. *Better investor access to preparatory work:* More consideration should be given to procedures that may improve the position of the investor vis-à-vis access to the preparatory work of the BIT under which it bases its treaty claim. Some possible options may be (1) to give the tribunal an express power to request the relevant preparatory work from any State parties to the relevant treaty;¹⁰⁰¹ (2) to give the tribunal an express power to request the non-disputing State, should it wish, the opportunity to provide the claimant access to relevant preparatory work or for their comments; (3) to encourage and promote the preparation and maintenance of more detailed and transparent public records in respect of investment treaty negotiations; and (4) to give tribunals the power to limit the disputing State's reliance to its advantage on the preparatory work if that State does not disclose to the claimant all relevant materials (within the limits of its legal obligations restricting such disclosure). More research in this field is required with a view to developing suitable solutions for the imbalance in access to the preparatory material.
7. *Use of different language versions:* The comparison of different language versions of investment treaties has not been used as a common tool by FIATs for the interpretation of ambiguous terms. This area is in need of more exploration. It may provide in some cases an important means with which to confirm or even arrive at an interpretation.

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¹⁰⁰¹ See, e.g., Article 13 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes pursuant to which WTO panels have the right to seek information and technical advice from any individual or body which it deems appropriate.